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# So You're Going to Try A Products Liability Case

By LOU ASHE\*

After the general employment of fictions has accustomed men to intentional change of law, bolder devices come into use . . . Law grows subconsciously at first. Afterwards it grows more or less consciously but as it were surreptitiously under the cloak of fictions. Next it grows consciously but shamefacedly through general fictions. Finally, it may grow consciously, deliberately and avowedly through juristic science and legislation tested by judicial empiricism . . .

*"The Spirit of the Common Law"*  
Dean Roscoe Pound, 1921

## I. Introduction; Limitations of the Inquiry

CONSIDERATIONS of space available cause discrimination in setting the perimeters of our discussion. We delimit intentionally meeting, as we do at the outset, a bonanza of writing in a veritable lava flow of materials covering all areas of the judicial terrain and legal thinking in the field of products liability.<sup>1</sup>

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<sup>1</sup> 3 AVERBACH, *HANDLING ACCIDENT CASES* ch. 40; BELLI, *TRIAL AND TORT TRENDS* (1959, 1960); FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* (1960); HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY*; NACCA, *PROCEEDINGS OF THE 14<sup>TH</sup> AND 15<sup>TH</sup> ANNUAL CONVENTIONS*, Reports of Products Liability Seminars and Panel Discussions, special reference Chapter XII (1960); Fricke, *Personal Injury Damages in Products' Liability*, 6 VILL. L. REV. 1 (1960); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1958); Prosser, *Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943); Prosser, *The Assault on the Citadel*, 69 YALE L.J. 1099 (1960); Wilson, *Products Liability: The Protection of the Injured Person; The Protection of the Producing Enterprise*, 43 CALIF. L. REV. 614, 809 (1955); *Products Liability in the Meat Packing Industry*, FOOD DRUG COS. L.J. 157 (1955); *Liability of Manufacturers of Home Furnishing for Harm Done by the Product*, INS. L.J. 519 (1955); *The Vendor's Responsibility for Quality in the Automated Retail Sale*, 9 KAN. L. REV. 139 (1960) dealing with the implied warranty of merchantability in goods sold in vending machines; *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941) dealing with food products mainly; *A Symposium on the Strict Liability of Manufacturers*, 24 TENN. L. REV. 923 (1957).

Even as we approach our rough draft, new decisions of our California courts, as well as those abroad, enlarging upon earlier concepts of liability for breach of warranty, spring from the advance sheets and reported cases with prognosticable regularity.<sup>2</sup>

While we may pause to reflect on the ancient insulation of the manufacturer or seller from suits for negligent injury asserted by those who could not penetrate the "privity curtain,"<sup>3</sup> the scope of the present inquiry, though it will touch upon the food and now drug exceptions, will be limited basically to the liability of manufacturers and sellers in warranty, to those personally injured in non-food cases. The emphasis will be on California law. The problems of pleading, notice, the statute of limitations, expert testimony, and instructions to the jury in the warranty case will be analyzed and substantial forms and methods offered for the consideration of trial counsel.

With the dramatic developments in the field of liability for negligence based on doctrines of "failure to warn,"<sup>4</sup> the annual preoccupations of "mice and men" in the Coca Cola cases,<sup>5</sup> the mounting concerns with under-arm deodorants,<sup>6</sup> or the chest rubbing ointments,<sup>7</sup> hair dyes, curling agents and shampoos,<sup>8</sup> allergic consumers with idiosyncratic response to the product's stimuli,<sup>9</sup> the temptation is great to move with broad brush onto the waiting canvas.

<sup>2</sup> E.g., *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961); *Gottsdanker & Phipps v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Paul v. Rodgers Bottling Co.*, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866 (1960); *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d —, 11 Cal. Rptr. 823 (1961); *Garon v. Lockheed Aircraft Corp.*, Super. Ct. Los Angeles County, reported *Aviation Cases* 17,418 (May 29, 1961); *Bleacher v. Bristol Meyers Co.*, 163 A.2d 526 (Del. Super. Ct. 1960); *Rauch v. American Radiator & Standard Sanitary Corp.*, 104 N.W.2d 607 (Iowa 1960); *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *Manzoni v. Detroit Coca Cola Bottling Co.*, unreported at this writing (opinion filed June 28, 1961 Michigan Sup. Ct.); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *General Motors Corp. v. Dodson*, 338 S.W. 655 *cert. denied* by Tenn. Sup. Ct., Sept. 9, 1960; *Sears v. Mund-Boilers, Inc.*, 336 S.W.2d 243 (Tex. Civ. App. 1960).

<sup>3</sup> 74 A.L.R. 2d 1095, 1011. "*Privity of contract is essential to recovery in negligence action against manufacturer or seller of product alleged to have caused injury.*" The editors not only cover all the bases—but the very earth supporting them—a "must" for all who would try a products liability case on whatsoever theory of negligence.

<sup>4</sup> *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958); *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *Comstock v. General Motors Co.*, 99 N.W.2d 627 (Mich. 1959); *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958); Cases collected, 25 NACCA L.J. 36 (1960).

<sup>5</sup> *Paul v. Rodgers Bottling Co.*, 183 Cal. App. 2d 670, 6 Cal. Rptr. 867 (1960).

<sup>6</sup> *Wright v. Carter Products, Inc.*, 244 F.2d 53 (2d Cir. 1957).

<sup>7</sup> *Martin v. Bengue, Inc.*, 136 A.2d 626 (Me. 1957).

<sup>8</sup> *Braun v. Roux Distributing Co.*, 312 S.W.2d 758 (Mo. 1959); *Rogers v. Toni Home Permanent Co.*, 147 N.W.2d 612 (Ohio 1958).

<sup>9</sup> *Crotty v. Schartenber's New Haven*, 162 A.2d 513 (Conn. 1960); *Negligence—Liability of Manufacturer or Vendor to an Allergic Consumer*, 49 MICH. L. REV. 253 (1950).

### *The "Good Old Days"*

In the "good old days," a man stood behind his goods. He took pride in them. Even though the customer was really not always right, if he did receive an inferior product the dealer would replace it. Since products were essentially simple in these days, and their inspection both by the dealer and the purchaser and ultimate consumer did not require a testing laboratory and intricate equipment, there were understandably but few American decisions involving personal injury from the use of a product.

Furthermore, the courts, in cases that did arise, were quite reluctant to abandon the privity requirement. To paraphrase Dean Pound, courts have felt it necessary to accustom men via fictions to the maturing face of justice. In 1958, however, the Michigan court, relegating surreptition and self-consciousness to its anachronistic antecedents, "put away the things of childhood" and took on the responsibilities of maturity.

It did this in *Spence v. Three Rivers Builders & Masonry Supplies, Inc.*<sup>10</sup>

Although no personal injuries were involved, the question of privity nevertheless intruded itself upon the case. Simply put, Mrs. Spence hired Cook to assist her in building a cottage. Cook bought building blocks from the defendant. Defendant contended Cook was an independent contractor and not plaintiff's agent. Thus, Cook was the initial vendee; that Mrs. Spence was not and, therefore, the manufacturer, despite any serious dispute as to the defective character of the blocks, was insulated from liability for breaches of the claimed express and implied warranties of merchantability. The lower court though finding no express warranties determined the blocks were in fact defective and as such there had been a breach of an implied warranty. However, all this was of no avail to the plaintiff, since "privity" was not present and the defendant was declared "home safe."

We have chosen to amplify this case because it is "classic in its simplicity" and devastating in its destruction of ancient myths. It ignored the often employed judicial escape hatches of "agency," "third party beneficiary" and other ingenious theories in endless variety adopted by courts because of a persistent unwillingness to accept a broader rule of strict liability.

Said Mr. Justice Voelker for the court:<sup>11</sup>

. . . [T]here is little doubt that in the past our court has for the most part devotedly followed the "general rule" and been reluctant to ex-

<sup>10</sup> 353 Mich. 120, 90 N.W.2d 873 (1958).

<sup>11</sup> *Id.*, at —, 90 N.W. 2d at 877-78.

tend recovery—beyond what may loosely be termed “food cases” involving personal injuries—to other defective products, regardless of whether they involved personal injuries or injuries to property. . . .

In fact, in the past in these situations we have not only tended to severely limit the factual area of recovery but we have shown an equally ready disposition to adopt and embrace the whole dreary legal apparatus and rhetoric so long employed in these situations to narrow or prevent any recovery at all. Some of these open sesame phrases are: whether there was privity or the lack of it; whether the defect was latent or patent; whether or not the offending product was sold in the original package; whether a vague requirement of a “higher degree of care” might alter the application of “the rule”; or whether the defective product did or did not contain an “inherently or imminently dangerous” article or substance harmful to humans. We do not exhaust the list. There are equally impressive and ominous catch phrases, and awesome have been some of the semantic bogs negotiated by ours and other appellate courts when in particularly harsh cases they have attempted by such artificial “exceptions” to get around the barrier imposed by their own equally artificial “general rule” of non-liability.

. . . .

*Saddled with such a doctrine and its hair-splitting exceptions, it is not surprising that while a few of our decisions have afforded passing illusory comfort to all, certainty has been afforded to none. (Emphasis added.)*

Pointing to the curious things courts can bring themselves to do and say “when they try vainly to wed the outmoded thinking and legal clichés of the past to the pressing realities of modern life,”<sup>12</sup> the opinion continues:<sup>13</sup>

Either lack of privity should always be a defense in these cases, or it never should be. The basic contractual notion of privity in this context has largely to do with the right of a party to *bring* his action against the person he seeks to hold, regardless of the injury suffered. The tort idea of care or lack of it has nothing whatever to do with *that* subject, though it may indeed have a lot to do with recovery.

*We can also find no reason in logic or sound law why recovery in these situations should be confined to injuries to persons and not to property, or allowed in food and related cases and denied in all others.* Nor, least of all, can we divine why our court should ever have felt compelled, in the generally narrow circumstances where it has allowed recovery at all, to split upon the duty of care into esoteric degrees of high, low or medium, as though care were a chancy and fluctuating barometer of conduct which rose or fell depending on the state of our livers . . . . There is only *one* degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation, whether

<sup>12</sup> *Id.*, at —, 90 N.W. 2d at 878.

<sup>13</sup> *Id.*, at —, 90 N.W. 2d at 878.

arising in the manufacture of canned beans or cinder blocks. Such confusion of care with privity in these cases is not only bad in itself but, worse yet, it inevitably tends to maim and muddy up the larger field of law in both contracts and torts. (Emphasis added.)

The court here stands in amazement at:<sup>14</sup>

[H]ow many American courts quickly fell upon it and blew it up into a "general rule" to relieve manufacturers of all liability; [of how the courts then gradually] . . . grafted upon it a bizarre cluster of "exceptions" . . . which wondrously grew and grew until . . . the exceptions devoured the rule. [While the English] . . . in due course scuttled their earlier dependence on this old dictum . . . many of our American courts remained tenacious in their devotion to the old "rule". . . .

Thus, privity was disposed of in Michigan and this enlightened court would permit no cinders in its judicial eye to blot out the "realities of modern life."

As we turn to a consideration of the law of California in the non-food warranty case, surely no impertinence will be found in the suggestion that the distinguished and learned justices of this respected tribunal will not be found looking into the rear view mirror for a reflection of what the law ought to be, but dead ahead at the busy freeway through a clear windshield. Let aside "the demands of social justice," there is honest equity in determining liability for breach of warranty based on the "increasing dependence of our population on mass producers for its food and drink, its cures and complexions, its apparel and gadgets" in a marketing milieu unsurpassed in any other country in the world.

### *Modern Times: What Makes the Warranty Run?*

Almost universally, observers of "trial and tort trends" have seized upon *Henningsen v. Bloomfield Motors, Inc.*,<sup>15</sup> for the banner headline of 1960 tort developments.<sup>16</sup> Rated as a notable successor to *MacPherson v. Buick Motor Co.*,<sup>17</sup> it is broad, sweeping and unequivocal as to the liability of the automobile manufacturer and his middleman distributor in *implied warranty* to a non-privity user. Plaintiff suffered injuries in a crash caused when "something went wrong from the steering wheel down to the front wheels." Plaintiff sued in negligence and upon implied warranty. The negligence issue was removed from the consideration of the jury which found liability in warranty.

<sup>14</sup> *Id.*, at —, 90 N.W.2d at 879.

<sup>15</sup> 161 A.2d 69 (N.J. 1960).

<sup>16</sup> 1960 *Annual Survey of American Law*, New York University School of Law.

<sup>17</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

Where California's *Peterson v. Lamb Rubber Co.*<sup>18</sup> is contained with the court's limitations as to the extent and condition of the manufacturer's liability to a user, no such frustrations are imposed in *Henningsen*.<sup>19</sup>

We hold that under modern marketing conditions, when a manufacturer puts a new automobile into the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. . . .

Removing any necessity for privity between manufacturer-dealer and the plaintiff-wife, it was firmly laid down that *the implied warranty of merchantability extended not only to the purchaser but to "members of his family, and to other persons occupying or using it with his consent."*<sup>20</sup> (Emphasis added.)

There is little question that the New Jersey court has adopted the philosophy that where the commodity is such as to be dangerous to life and limb when defectively manufactured, there is a warranty "*running with the goods*" capable of reaching all who are likely to be hurt by its foreseeable use.

The language is reminiscent of Mr. Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>21</sup> The *Henningsen* beacon appears to have lighted the way to other decisions along the privity coastline.<sup>22</sup>

With the *Henningsen* case for background music, how has this theme developed in California?

Prosser characterized the *Peterson* case as one of the "seven spectacular decisions" in the warranty field.<sup>23</sup> Here, the corporate employer purchased an abrasive wheel. During normal use by an employee it disintegrated causing injury, allegedly because of a latent defect. Peterson sued in negligence and on implied warranties of fitness and merchantability. The trial court following "the rule" threw the warranty counts out. The jury failed to find the defendant negligent and

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<sup>18</sup> 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960).

<sup>19</sup> 161 A.2d 69, 84 (N.J. 1960).

<sup>20</sup> *Id.* at 100.

<sup>21</sup> 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) ". . . it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injuries to human beings. . . . Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce to life and health . . ."

<sup>22</sup> *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. 1960).

<sup>23</sup> Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

the question was plainly posed to the appellate courts. Will lack of of privity bar the injured employee of the employer-purchaser from suit in implied warranty where a latently defective product, known by the manufacturer to be dangerous when defective, causes injury to such employee?

Reversing the trial court, the supreme court, in effect, advanced two theories: (a) Foreseeability by the manufacturer that under modern industrial usages the instrumentality would inevitably be used by the employee of the vendee and (b) that, in effect, a species of privity existed based upon the concept that the "employee had the successive right to the possession and use of the grinding wheel"<sup>24</sup> and armed with such successive relationship, privity existed between the manufacturer and the injured employee.<sup>25</sup>

The opportunity was broad for extensive review of the court's position in the light of developments in the non-food, ultimate user case. It observed the American scene, concluding that the authorities offered were either exceptions relating to food cases or cases involving breach of an express warranty via "privity street"—Madison Avenue.<sup>26</sup>

In *Hinton v. Republic Aviation Corp.*,<sup>27</sup> the federal court in New York (where the state courts still cling to "the rule") showed no reluctance in accepting the substantive quality of *Peterson* under conflicts of law principles in a wrongful death case involving an airline passenger. The aircraft in question was manufactured in California, and the contract of passage and the accident occurred in California. The action was against the defendant manufacturer for breach of an implied warranty claimed to run to the *user*, deceased. With broad reference to Mr. Justice Traynor's concurring opinion in the *Escola Case*, the federal court, applying California law, and making specific reference to *Peterson*, stated in part that California:<sup>28</sup>

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<sup>24</sup> 54 Cal. 2d 339, 348, 353 P.2d 575, 581, 5 Cal. Rptr. 863, 869 (1960).

<sup>25</sup> *Ibid.* "... in the present context, the employee had the successive right to the possession and use of the grinding wheel . . . and we believe, should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranties of fitness for use and of merchantable quality."

<sup>26</sup> Said a student commentator recently with valid perspective: "A regrettable aspect of the *Peterson v. Lamb* opinion . . . is that the court failed to take this opportunity to re-examine its position on the privity of contract requirement and make an extensive statement of its present position. There is need for clarification of California law in this area." Commenting further on Henningsen, this student asks: "If faced with a similar situation, would California extend protection to the immediate family of the purchaser of household goods? Would the manufacturer be subject to direct suit, where he is not the vendor?" 34 So. CAL. L. REV. 98 (1960).

<sup>27</sup> 180 F. Supp. 31 (S.D.N.Y. 1959).

<sup>28</sup> *Id.* at 33.



... [A]ppears to have endorsed the Traynor doctrine and to have virtually abrogated the privity of contract hurdle in an abrasive wheel case. . . . The Peterson case of 1959 . . . *appears to definitely indicate California's determination to end the privity doctrine, even in other activities than food.* This appears, moreover, to be in accord with the trend elsewhere . . . . (Emphasis added.)

In May, 1960, *Henningsen* swept fictitious devices, "exceptions to the rule," and for good measure, the uniform warranty of the Automobile Manufacturers Association and "disclaimer" of implied warranty into historical limbo. "Disclaimer" was "out" as inimical to the public good. Implied warranty was "in" for the public's protection. Acknowledging the early common-law concepts of contractual liability and the privity requirement, it faced the reality in this fashion:<sup>29</sup>

In more recent times a noticeable disposition has appeared in a number of jurisdictions to break through the narrow barrier of privity when dealing with the sale of goods in order to give realistic recognition to a universally accepted fact . . . that the dealer and the ordinary buyer do not, are not expected to, buy goods . . . for their own consumption. Makers and manufacturers know this and advertise and market their products on that assumption. . . . *Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer.* (Emphasis added.)

Where are the warranties running in California as of this writing? In *Garon v. Lockheed Aircraft Corp.*<sup>30</sup>—recently before the court on demurrers to causes of action for breach of implied warranty charged to the manufacturer of the aircraft in which one Mickus, deceased, perished—the trial court, following *Peterson* and the interpretation of *Hinton*, overruled the demurrers extending the "family doctrine" from "industrial family" to a member of the "commercial family" of the airline which purchased the alleged defective aircraft from defendant. Viewing the dangers involved in a high-speed airplane defectively made and the common knowledge of defendant that the airline-vendee operated the aircraft for the transportation and use of passengers, the court concluded: "It seems clear in California the trend is against the strict application of the requirement of privity. . . . The passenger here as a member of the 'commercial family' of the airline company may maintain the action against the manufacturer on the ground of breach of warranty."<sup>31</sup>

<sup>29</sup> 161 A.2d 69, 81 (N.J. 1960).

<sup>30</sup> 7 Aviat. 17, 418 (6-27-61).

<sup>31</sup> *Id.*

The law in this area is developing dynamically and with great impact consistent with the prognostications of sound legal writers and judicial forecasts. It has been stated that, "The interest in consumer protection calls for warranties by the maker that *do* run with the goods, to reach all who are likely to be hurt by the use of the unfit commodity for a purpose ordinarily expected."<sup>32</sup>

## II. Don't Get Caught With Your Theories Down

Recalling that this discussion is limited to the non-food case as it involves either the direct purchaser or the "ultimate user" of a defective product, we turn briefly to discuss the available theories for the pursuit of a cause of action. The two main avenues of approach lie in the field of negligence and breach of warranty.

### *Negligence*

A count in negligence alone, may find the plaintiff outside the courtroom wondering "what happened?" The difficulties attendant upon the proof of negligence of the remote manufacturer have been dramatically illustrated in many recent cases. *Peterson* never made it via the negligence route. *Henningsen* would have been sheer despair, rather than a leading case had counsel relied on negligence alone. *Gottsdanker v. Cutter Laboratories*,<sup>33</sup> failed in negligence and became authoritative in the law of drugs solely on the warranties upheld.

Even where the "*res ipsa*" doctrine appears applicable to the facts of a product's failure or defect, experienced counsel have known again and again the anguish of the defendant's "experts' parade" with the music sounding a dirge to the last vestige of the inference to which the plaintiff has held so tenaciously.

The difficulties of proof in a products case make negligence an extremely undesirable remedy for plaintiff to pursue. Even when he has succeeded in surmounting the burden cast upon him, the plaintiff faces the hurdles of contributory negligence and assumption of the risk.

Where a plaintiff has a choice between actions based upon negligence and actions based upon warranty, certainly the preferable choice is warranty. However, this assumes the choice to be available. It may not be. Necessary privity of contract may not exist. The opportunity to give timely notice of the breach may have passed.

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<sup>32</sup> 2 HARPER & JAMES, TORTS § 28.16 (1938); see also PROSSER, TORTS 506 (2d ed. 1955).

<sup>33</sup> 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

## *The Warranties*

For practical purposes, the warranties are three in number. We set out their codifications below.<sup>34</sup>

### *The Express Warranty*

Generally we think of express warranty as arising out of a contract. However, it may arise out of advertisement. This latter concept is extremely important from a practical standpoint as it obviates the necessity for privity.<sup>35</sup> It was the Ford Company's pride in its alleged "Triplex Shatter-proof Glass Windshield" which gave rise to the first important recognition of strict liability, regardless of scienter or negligence. In *Baxter v. Ford Motor Co.*,<sup>36</sup> plaintiff put his confidence in the representations contained in catalogues and other printed material issued by the defendant. Typical of the representations were the glowing promises of "extra margin of safety"—"eliminating the danger of flying glass." A pebble struck the windshield, caused it to shatter, and thus brought Mr. Baxter to court, where, after sober consideration this opinion emerged:<sup>37</sup>

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because

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<sup>34</sup> The definition of an express warranty is set forth in CAL. CIV. CODE § 1732: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The implied warranties are two in number and are set forth in CAL. CIV. CODE § 1735: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill, judgment (whether he be the grower or the manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

<sup>35</sup> Specific representations made by a seller touching upon the quality of his product may in fact provide a different basis for strict liability to the consumer with no privity required. It may be said basically that express warranties are generally effected for the protection of the buyer, not to limit the liability of the seller.

<sup>36</sup> 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932).

<sup>37</sup> *Id.* at 462, 12 P.2d at 412.

there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recovery if damages result from the absence of those qualities. . . .

This decision has been followed rather consistently in the United States in a great variety of cases involving everything from cosmetics to the bulging mattress which finally pops a spring. The latter event is reflected in the California decision, *Maecherlein v. Sealy Mattress Co.*,<sup>38</sup> which we will discuss at some length, *infra*.

### *The Implied Warranty of Merchantability*

According to Mr. Justice Wood in *Moore v. Hubbard & Johnson Lumber Co.*,<sup>39</sup> the term "merchantable quality" has been given a multitude of definitions. But all of them include the basic proposition that the phrase refers to goods which are reasonably suitable for the ordinary uses and purposes of goods of the general type described by the terms of the sale, and which are capable of passing in the market under the name or description by which they are sold. Clearly, the statutory warranty is sufficiently broad to impose liability in the absence of disclaimer if the goods contain an impurity of such a nature as to render them unusable, and therefore not salable for the general uses and purposes of goods of the kind described.<sup>40</sup>

The mere fact that the defect was latent or hidden does not excuse the seller. The substantial weight of authority is to the effect that, under the Uniform Sales Act, the implied warranty extends to latent defects.<sup>41</sup>

The warranty of merchantability is not a warranty that the goods shall be perfect or of the best quality.<sup>42</sup> Similarly, a product may be merchantable when it is reasonably suitable for the ordinary use it is manufactured to meet even though it may incidentally cause injury to the user. A striking example of this is *Simmons v. Rhodes & Jamieson, Ltd.*<sup>43</sup> There, the plaintiff purchased ready-mixed concrete from defendants. While it made fine concrete, it also, by reason of the quicklime, produced substantial burns upon plaintiff. The court said:<sup>44</sup>

"Merchantable quality" means that the substance sold is reasonably suitable for the ordinary uses it was manufactured to meet. . . . It is conceded that the cement was fit for the purpose of laying a base-

<sup>38</sup> 145 Cal. App. 2d 275, 302 P.2d 331 (1956).

<sup>39</sup> 149 Cal. App. 2d 236, 308 P.2d 794 (1957).

<sup>40</sup> *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954).

<sup>41</sup> *Tremeroli v. Austin Trailer Co.*, 102 Cal. App. 2d 464, 227 P.2d 923 (1951).

<sup>42</sup> *Giant Mfg. Co. v. Yates-American Machine Co.*, 111 F.2d 360 (8th Cir. 1940); *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936).

<sup>43</sup> 46 Cal. 2d 190, 293 P.2d 26 (1955).

<sup>44</sup> *Id.* at 194, 293 P.2d at 29.

ment floor. This is the only purpose for which the test of merchantability could be applied under the facts of the present case. . . .

Deviating for the moment from "warranty" to "negligence" and "failure to warn," consideration of *this* subject would be incomplete without an appreciation of the principles laid down in *Haberly v. Reardon Co.*<sup>45</sup> Here a twelve-year-old child was helping his father paint bricks in the driveway with "Bondex." The father inadvertently passed the brush past the youngster's eye. The substance contained forty-seven per cent Portland cement and forty-four per cent calcium oxide, i.e.—lime (unknown to the father). Following the accident, the warning on the label was changed to "Care Should Be Taken To Avoid Contact With the Eyes."

Here was a product containing lime. It was perfectly good *merchantable paint*, but the inadequacy of the warning (negligence) regarding the lime constituent brought the case to a plaintiff's verdict by the jury. Thus we observe that the supplier's obligation in this regard may be technically divorced from other strains of supplier's liability, defective construction, sub-standard inspection, and the like.

In the decision, the manufacturer's liability to warn is analyzed anatomically. Applying New York law, the Missouri Supreme Court held:<sup>46</sup>

We think the jury reasonably could have found that the defendant, as the manufacturer of Bondex for use by householders, reasonably could have anticipated that it was likely that Bondex would get into the eyes of some of those users, of some of those who would be helping users, and of some of those who would be in the vicinity at the time the Bondex was being used. And we think a jury reasonably could have found also that defendant, under the facts of this case, reasonably could have anticipated that the hazard or risk of Bondex lodging in the eyes of those noted included a wide variety of ways, usual, unusual, unique, peculiar, and bizarre, in which paint might get into one's eye, and included the way, as in the instant case, involving an unexpected movement by a helper such as plaintiff. That must be true because, as we see it, it was not the exact manner of the occurrence (the particular freak accident, as defendant calls it) which must have been reasonably foreseeable in the judgment of a jury to inflict liability on the defendant; rather, it was the hazard or risk of Bondex by some accidental means lodging in the eye of one helping the user or otherwise in the vicinity of user.<sup>47</sup>

<sup>45</sup> 319 S.W.2d 859 (Mo. 1958).

<sup>46</sup> *Id.* at 863.

<sup>47</sup> Here again choice of a theory was important. The product was merchantable and fit for its purpose—paint. Pursuit of a "warranty" theory may have been disastrous standing alone. The case turned on the culpability, if any, of the manufacturer's warning. Here the plaintiffs' expert's testimony was vital to victory. *The defendant's executive vice-president admitted that he had learned only two weeks before trial that*

### *The Implied Warranty of Fitness for Purpose*

The courts frequently in discussing the implied warranties created by the Sales Act intermingle the warranty of fitness with that of merchantability. They are, of course, separate and distinct warranties. An article may be merchantable and yet not fit for the particular purpose. For example, a pair of roller skates might in all respects be good, well constructed, properly functioning roller skates, but they certainly would not be fit for the purpose of propulsion in an ice arena.

Fitness for purpose is a question of fact. Some evidence that the product was not fit exists where it failed in its normal use.<sup>48</sup> While the requirement is that the user must have relied upon the skill and judgment of the seller, in order for an implied warranty of fitness to exist it does not necessarily follow that where a product is sold by its trade or brand name, the warranty of fitness is excluded. Where a purchaser buys a product by a brand name, two possibilities exist: He may be relying upon his own judgment or the promotional efforts of the manufacturer, or he may be relying upon the skill and judgment of the seller. Which of these alternatives exists is a question to be determined by the trier of fact.<sup>49</sup>

At least one California case holds that "fitness" means reasonable fitness. *Waltz v. Silveira*<sup>50</sup> involved the action for the purchase price of a fireproof safe. The buyer, not unreasonably, complained that the safe was not fit for its intended purpose, as the contents of the safe were totally destroyed in a fire. The court was not impressed by this not unreasonable contention, but decided in accordance with expert testimony that the safe in question was reasonably fireproof, and that no so-called "fireproof safe" could have gone through the particular fire involved without serious damage to the safe and its contents.

Much apparent learning is lavished upon the application of the two implied warranties. The substance of the warranties is clearly set forth in the code section creating them. The bulk of the cases involving them, when carefully analyzed, will disclose that the problem is not a legal one, but rather a factual determination.

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*calcium oxide* was LIME. In the light of this testimony, what warning did the father have who never before had used "Bondex" and assumed it to be like any other outside white paint. See also, *Edison v. Lewis Mfg. Co.*, 168 Cal. App. 2d 429, 336 P.2d 286 (1959), and a scholarly review of the subject in 23 NACCA L.J. 29 (1959), and 25 NACCA L.J. 31 (1960).

<sup>48</sup> *Tremeroli v. Austin Trailer Co.*, 102 Cal. App. 2d 464, 227 P.2d 923 (1951).

<sup>49</sup> *Odell v. French*, 146 Cal. App. 2d 504, 304 P.2d 45 (1956).

<sup>50</sup> 25 Cal. App. 717, 145 Pac. 169 (1914).

## *Is Contributory Negligence Properly A Defense in a Warranty Action?*

A question presently not decided in California—although it has been raised in one case now on appeal—is whether contributory negligence is a defense to an action for breach of warranty.<sup>51</sup>

California Civil Code section 1735 (3) reads as follows: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination of it ought to have revealed."

Contributory negligence has been the subject of much learned writing and investigation.<sup>52</sup> Various theories have been advanced to explain its proper place within the framework of the law. Some writers have put its basis upon the assumption of risk and contributory negligence, which while sometimes covering the same ground, are separate and distinct offenses. Assumption of risk involves a voluntary and deliberate incurring of a known peril by the plaintiff. Contributory negligence frequently consists in a careless failure to notice danger. Perhaps the most rational approach to the contributory negligence problem is that it is one of causation.<sup>53</sup> This view was expressed in *Thomas v. Quartermain* per Bowan, L. J., where it was said:<sup>54</sup>

Contributory negligence rests on the view that the defendant had in fact been negligent, yet the plaintiff has, by his own carelessness, severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause.

The last clear chance doctrine illustrates that contributory negligence is in fact a different way of stating that defendant's negligence, if any, was not the proximate cause of the plaintiff's injury. This doctrine traditionally takes the form: Defendant has been negligent; plaintiff himself has also been negligent; despite plaintiff's negligence, defendant had a reasonable opportunity to avoid the accident. Hence plaintiff's negligence should not bar his recovery.

<sup>51</sup> *Young v. Aerial Products Co.*, 248 F.2d 185 (9th Cir. 1957) while denying recovery on other grounds stated: "We have not been referred to, nor could independent research find, any California case holding that negligence on part of the person injured is a defense to an action based on breach of warranty."

<sup>52</sup> SALMOND, *TORTS* preface to the 6th edition (1923) said: "No more baffling and elusive problem exists in the law of torts, and observed that an undergraduate once got high grades for writing in an examination: 'Every judge whom I have met assures me that the law of contributory negligence is perfectly simple, but I notice that they are all reversed on appeal.'"

<sup>53</sup> *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 272 (1952); *The Proximate Cause—Duty Enigma in the Tort of Negligence*, 31 SO. CAL. L. REV. 99 (1960).

<sup>54</sup> 18 Q.E.D. 685, 697 (1887).

Long before there was any doctrine of negligence, and, correspondingly, any doctrine of contributory negligence, English law recognized the principle. Plaintiff could not recover for injuries which were proximately caused by his own fault. As early as the reign of Edward IV it was recognized that if the act which caused the damage was the act of plaintiff himself, then he had no cause of action.<sup>55</sup>

The law of liability of sellers of food for breach of implied warranty of fitness is far older than the doctrine of negligence. Reported cases are found in the year-books as far back as the fifteenth century. Holdsworth says: ". . . Similarly, persons like taverners or butchers, whose business it was to sell food, are liable to an action of deceit on a case if they sold unwholesome food, whether or not they had made representations as to the quality of the food."<sup>56</sup>

While some courts have held contributory negligence to be a defense to an action for breach of warranty, this result often is reached through confusion forced upon the court. Analysis of the cases will show that the court, in reaching such conclusion, has misunderstood the doctrine of contributory negligence or blindly followed a previous case.<sup>57</sup>

The first case dealing with the question of contributory negligence as a defense to breach of warranty is *Friend v. Charles Dining Hall*.<sup>58</sup> Here in an action to recover for breach of warranty as a result of injury sustained when eating beans containing stones, the court said:<sup>59</sup>

The baked beans served to the plaintiff with the stones of the size of and resembling beans might have been found to be not reasonably fit to be eaten. A foreign substance of that sort, with its possibilities for harm to teeth, may have been determined by the jury not proper to be served in food. It has been argued that it should have been ruled as a matter of law that the plaintiff was not in the exercise of due care and on that ground could not prevail. *Due care is not a term of the law of contract, but of torts.* This is an action of contract. The obligation resting upon the defendant and accruing to the plaintiff arose out of the contract. (Emphasis added.)

*Hansen v. Firestone Tire & Rubber Co.*<sup>60</sup> was an action to recover for injuries received in an automobile accident allegedly caused by

<sup>55</sup> III HOLDSWORTH, HISTORY OF ENGLISH LAW 378 (3d ed. 1923).

<sup>56</sup> *Id.* at 386.

<sup>57</sup> An extreme example is *Parrish v. Great Atlantic & Pacific Tea Co.*, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958). There the court said: "Furthermore, although negligence plays no part in a breach of warranty action, contributory negligence may be asserted as a defense to breach of warranty action." (Citing thirteen cases.) The cases cited in *Parrish*, however, do not support the foregoing statement; and at least nine of the thirteen cases do not even discuss warranties.

<sup>58</sup> 120 N.E. 407 (Mass. 1918).

<sup>59</sup> *Id.* at 410.

<sup>60</sup> 276 F.2d 254 (6th Cir. 1960).



failure of tires. Plaintiff claimed breach of an *express* warranty. The court laid down the rule that:<sup>61</sup>

Negligence on the part of the buyer would not operate as a defense to the breach of warranty. If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the revelation that the qualities do not exist, would not defeat recovery. As Justice Butzel said in the Bahlman case, there is neither "reason nor authority" for introducing the defense of contributory negligence into an action for breach of warranty. The particular qualities of the Firestone supreme tires set out in a brochure were represented as protection against just such an accident as actually occurred here. . . .

In *Simmons v. The Wichita Coca-Cola Bottling Co.*,<sup>62</sup> plaintiff not only got a Coca-Cola for her money, but a packet of matches for a bonus (unfortunately these were *in* the bottle). The action was for breach of warranty of fitness. After plaintiff drank one-third to one-half of the bottle of "Coke," her sister called to her attention some foreign substance in the bottle. Plaintiff, unused to drinking matches in her "Coke," became sick. The court said:<sup>63</sup> "We held in *Challis v. Hartloff*, . . . that neither allegations of contributory negligence nor those negating any possible carelessness on the part of defendants are an answer or defense to an action to recover on the breach of an implied warranty."<sup>64</sup>

What one is tempted to conclude after wide reading of many cases where courts have faced this tantalizing problem, is that the plaintiff's activity comes into consideration more acutely on the question of whether the alleged breach of warranty was in fact the *proximate cause* of the injury; whether some unreasonable use of the product by the purchaser (and where no privity is required—the ultimate user)

<sup>61</sup> *Id.* at 258.

<sup>62</sup> 309 P.2d 633 (Kan. 1957).

<sup>63</sup> *Id.* at 635.

<sup>64</sup> In the recent case of *Manzoni v. Detroit Coca Cola Bottling Co.*, filed June 28, 1961 (Oct. Term 23-24, Michigan Supreme Court), the husband purchased and the wife drank the cola. She became ill. On return from the bathroom, she observed the bottle to contain "that sticky thing stuck to the bottle—all brown and dirty—slimy looking like shreds of tobacco." She was shocked into a second episode of nausea. There was no evidence that she examined the bottle before drinking the contents, and although "it didn't taste just right" she drank it. Defendants, among other objections, urged they were prejudiced by failure of the trial court to instruct on contributory negligence. Rejecting the defendants' multiple contentions (including the necessity for proving negligence in a warranty case), the court held: "*Much of this is utterly inconsistent with an action based on a warranty theory. It was plaintiffs' theory of their cause of action that a manufacturer who prepares 'foodstuffs destined to be sold to and consumed by the public is bound by an implied warranty that its product is free from foreign, poisonous or deleterious substances,' . . . and they are entitled to go to the jury on it.*" (Emphasis added.)

was the cause of the injury. Often proximate cause fails because the user knowingly "assumes the risk." This is something else again since proximate cause is an essential element of plaintiff's case in warranty. But this is not to say that contributory negligence per se is a defense to a breach of warranty action.<sup>65</sup>

The conduct which becomes questionable is most usually found in situations where, for example, plaintiff uses a rope after it is broken, a horse after its bizarre propensities are known, improperly cooks pork though an experienced cook, uses a refrigerator meat showcase after it is known to be defective, eats biscuits which "smell like carrion," and like situations.

Put succinctly, there is a point where plaintiff asserting a warranty must do so in an atmosphere reflecting reasonable conduct on his part. Ultimately, it is Prosser who lights the way to understanding in this area:<sup>66</sup>

The confusion is merely part of the general murk which surrounds "warranty," and is another indication that that unhappy word is a source of trouble in this connection. If "warranty" is a matter of contract, or equally if it is one of strict liability in tort, how can contributory negligence be a defense when the action is not one for negligence?

When the cases are examined, however, they fall into a very consistent pattern, and it is only their language which is confusing. Those which refuse to allow the defense have been cases in which the plaintiff negligently failed to discover the defect in the product, or to guard against the possibility of its existence. They are entirely consistent with the general rule that such negligence is not a defense in an action founded on strict liability.

### III. A Pleading "Fit for the Purpose" in Warranty

We once conducted a contest at our office to determine who could write the shortest, most concise, "non-demurrable" complaint in an auto-personal injury suit. It taught us one important thing—to leave some breathing space, to keep the pleading broad with no self-imposed perimeters confining the theory of the case; to create a skeleton and not a structure. Too often the complaint must be filed without a full investigation. Broad discovery may produce "jewels without price." The complaint must be capable of absorbing every nuance of the claimed breaches of warranty developed in this fashion.

Obviously, space forbids "making a production" of this phase of our paper. Where we offer a pleading in "negligence" this is no indication that additional counts in warranty should not be considered and

<sup>65</sup> 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 367 (1960).

<sup>66</sup> PROSSER, *The Assault on the Citadel*, 69 YALE L.J. 1099 (1960).

stated in additional causes of action. These are elemental guideposts—something to hang your pleading on. (Pleadings appear in Appendix A to this article—editor.)

#### IV. When Does the Statute Run in the Warranty Case

The law is settled that the statute of limitations in warranty does not commence to run until such time as the breach is discovered or, in the exercise of ordinary care, should have been discovered.<sup>67</sup>

Thus, if an express warranty relates to some future event, the statute will not commence to run until that event has transpired.<sup>68</sup>

Where the breach of warranty gives rise to personal injuries, some interesting problems are presented. The district court held in *Crawford v. Duncan*,<sup>69</sup> in an action for breach of warranty arising out of an oral contract (where the defendant had warranted that radium treatments would not leave a permanent scar), the action being based upon contract and not upon malpractice—the applicable statute of limitations was that for breach of oral contract<sup>70</sup> and not the one-year statute for injuries to the person.<sup>71</sup>

In *Rubino v. Utah Canning Co.*,<sup>72</sup> a food-implied warranty case, the court reached a contrary result and specifically disapproved *Crawford v. Duncan*. It determined the one-year statute applied and reasoned thus:<sup>73</sup>

It seems apparent that the legislative intent . . . was not to restrict . . . coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the tort, contract or breach of express or implied warranty aspect of the case.

In the light of *Rubino* where damage for personal injury or death is sought upon the basis of an implied or express warranty, "safe con-

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<sup>67</sup> *Ackerman v. A. Levy & J. Zentner Co.*, 7 Cal. App. 2d 23, 45 P.2d 386 (1935); *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277 (1920).

<sup>68</sup> *California Enterprises, Inc. v. D. N. & E. Walter & Co.*, 78 Cal. App. 2d 750, 178 P.2d 785 (1947); *Aced v. Hobbs-Secack Plumbing Co.*, 55 Cal. 2d —, 360 P.2d 897, 12 Cal. Rptr. 257 (1961) wherein the court stated: "If a warranty relates to a future event before which the defect cannot be discovered by the exercise of reasonable diligence, the warranty though accompanied by a representation as to present conduct, is prospective in character and the statute of limitations begins to run as of the time of that event." (Aced having filed its complaint within four years from a reasonable date of discovery—the statute was held not to be a bar.)

<sup>69</sup> 61 Cal. App. 647, 215 Pac. 557 (1923).

<sup>70</sup> CAL. CODE CIV. PROC. § 339.

<sup>71</sup> CAL. CODE CIV. PROC. § 340(3).

<sup>72</sup> 123 Cal. App. 2d 18, 266 P.2d 163 (1954).

<sup>73</sup> *Id.* at 26, 266 P.2d at 168.

duct" can be assured only by strict adherence to the one year statute of limitations.

## V. Put a Letter in the Mail and Save Your Case!!

### *The Sales Act Requires Notice of Breach*

California Civil Code section 1769, section 49 of the Uniform Sales Act and 1A Uniform Laws Annotated, contain identical language requiring notice to the seller of the breach of any promise or warranty within a reasonable time.

Actually, it doesn't take much effort to comply,<sup>74</sup> but comply you must or, for practical purposes, counsel will have nothing to "sell" under the Sales Act to any insurance claims adjuster awake and breathing.

At common law the rule was harsh. When Blackheart sold Whiteheart some goods and title passed—he had it! If Whiteheart had complaints of breach of warranty, he might reach Blackheart's tender compassion, but he could never make it past demurrer or nonsuit.<sup>75</sup>

California Civil Code section 1769 reads:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in contract to sell or the sale. But, if, after acceptance of the goods the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Thus, the "accept at your peril" policy was ameliorated, but, conditioned on reasonable notice to the seller so as to preclude the filing of stale claims.

While this is clearly the California rule, Frumer, in his recent survey of the "products" field, states "it is the better view that the notice

<sup>74</sup> California law is to this effect. *Whitfield v. Jessup*, 31 Cal. 2d 826, 830, 193 P.2d 1, 4 (1948) holding sufficient a letter from plaintiffs' counsel indicating a claim was being made for a disease contracted by use of defendant's dairy product sold to plaintiffs by defendants. "No particular form of notice is required. It need merely apprise the seller that the buyer intends to look to him for damages." In the "Cutter Cases" the notice stated simply (names have been omitted): "Our office represents JANE DOE, a minor, in her claim for damages against you, and this will serve as notice to you that the Cutter vaccine administered to her in GREENTOWN, on or about (date) was not of a merchantable quality, nor fit for the purpose for which it was intended, and that as a result of the injection, said breaches of warranty of merchantability and fitness for purpose, and your failure to warn, JANE DOE became ill with a disease diagnosed as poliomyelitis."

<sup>75</sup> *Burkett v. Dental Perfection Co.*, 140 Cal. App. 2d 106, 294 P.2d 992 (1956). However, there was some authority as early as 1956, that under common law notice of breach of warranty was not a prerequisite.

provision of the Act is *inapplicable* at least where personal injuries are sustained.”<sup>76</sup> The notice provision of the Act has also been held inapplicable in a warranty action between a manufacturer and remote consumer of a beverage containing a foreign substance on the ground that the action was not between a “buyer” and “seller.”<sup>77</sup> “This approach would obviate the necessity for notice in any case where there is not privity of contract. It, of course, assumes that privity is *not* a prerequisite to recovery on warranty.”<sup>78</sup>

Surely, one of these days some enterprising California lawyer confronted with serious injury to a non-vendee, “no privity” client who arrives, ailing and all, two days before the statute of limitations runs, will present the matter squarely to our California Supreme Court. He may get some encouragement, depending on just where we are headed with the continuing insistence for privity as against the remote manufacturer in warranty.

### *When Is Notice Timely?*

The admonition of the Sales Act is that notice be given “within a reasonable time after the buyer knows or *ought to know* of such breach.” In *Whitfield v. Jessup*,<sup>79</sup> a food case, the claim was undulant fever caused by raw cream ingestion during February to March, 1944. Notice was given November 20, 1944. Initially diagnosed as a “flu” sufferer, ultimately in June plaintiff became delirious, was hospitalized and found to have undulant fever. The precise question was: when ought plaintiff to have discovered the breach? Holding the notice in November to be adequate, the court reasoned:<sup>80</sup>

The defect is latent and it is reasonable to infer that the only way discovery of it might occur would be through the effects on her body and a physician's advice in respect to such effects. She would not then know the source of her illness until she had been advised of it. By reason of her illness she may not have been in a position to form an intelligent conclusion and be sufficiently alert to protect her rights.

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<sup>76</sup> FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 19.05 (1960) for a broad discussion of the subject nationwide.

<sup>77</sup> *Wright Bachman, Inc. v. Hodnett*, 235 Ind. 307, 133 N.E.2d 713 (1956), holding that the Sales Act did not change the common law rule that notice is not required as to *consequential damage as opposed to commercial loss*. Case involved a defective ladder. (Emphasis added.)

Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1130 (1960), warns that “as applied to personal injuries, and notice to the remote seller, it (the notice requirement) becomes a booby-trap for the unwary.” See also, James, *Products Liability*, 34 TEX. L.R. 44, 192, 197 (1955).

<sup>78</sup> 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY (1960).

<sup>79</sup> 31 Cal. 2d 826, 193 P.2d 1 (1948).

<sup>80</sup> *Id.* at 831-32, 193 P.2d at 4 (1948).

As to what constitutes a *reasonable time*, the late Mr. Justice Carter concluded:<sup>81</sup>

What constitutes a reasonable time where the goods sold are foods containing latent defects, which are immediately consumed, *presents a different question than does the ordinary sale where the article is subject to examination and use which will reveal its defect. . . .* The case must be controlled by its special circumstances.

In *Maecherlein*, the plaintiff, who probably would have settled for sleeping on a non-spring-protruding mattress, let alone a cloud, had an interesting problem. Armed with a ten-year warranty on the Sealy, plaintiff discovered after a year and a half that the mattress was "bunching, sagging and lumping." Whether plaintiff endured this indignity to her sleep on the theory that even clouds may sag and bunch or out of consideration to advertising counsel is not clear. Not until a spring finally penetrated her derriere, five years after the purchase, did she "ouch" her way first to the doctor, and thence to counsel's office.

*Without discussion of privity* and basing its finding on an express warranty, the court, relative to the timeliness of the notice, said:<sup>82</sup>

Adequate notice was given within a few days after the accident occurred. Appellant's argument that notice should have been given in a year and a half after purchasing the mattress because it was "bunching, sagging and lumping" would require plaintiff to anticipate (when the notice finally came, it came with a bang!) that a broken spring would ultimately protrude and result in injury.

Viewing the law in California and abroad, the timeliness of notice, where required, will be controlled by the circumstances. Although usually a jury question, notice has been held as a matter of law to be timely.<sup>83</sup> Conceivably, notice may be so flagrantly tardy or inadequate, the defendant may appropriately urge a finding of notice failure as a matter of law.<sup>84</sup>

On the present status of California law, with the little effort involved, whether the plaintiff is a buyer or removed from the immediate privity family, the suggestion that notice be given is in order. Better

<sup>81</sup> *Id.* at 832, 193 P.2d at 4 (1948).

<sup>82</sup> 145 Cal. App. 2d 275, 278, 302 P.2d 331, 332 (1956).

<sup>83</sup> *Bonker v. Ingersoll Products Corp.*, 132 F. Supp. 5 (Mass. 1955), applying Pennsylvania law. A "boneless chicken" case. Injury April 2, notice August 1 that year. Giving the "buyer" a break, the court said: "Courts usually generalize about 'protecting' the seller from 'belated claims.' But protecting him from what, exactly? Did the delay injure his opportunity to investigate, or defend, or take action to minimize damages? Did it suggest that the injury may not in fact have been due to breach of warranty, or that the claim was an afterthought? . . . In this case the jury could find, indeed, I believe it had to find, an answer favorable to plaintiff as to all of these issues."

<sup>84</sup> *Davidson v. Herring H. M. Safe Co.*, 131 Cal. App. 2d 874, 280 P.2d 549 (1955).

this than the shocking experience of visualizing the gruesome burns and shattered aircraft with a remedy gone for lack of a thirty cent investment.

At any rate, to make life simpler, we have cited and summarized the California cases on this sensitive subject as follows:

### *Notice Must Be Pleaded and Proved*

It is necessary, in order to maintain an action for breach of warranty, that the required notice be pleaded and proved. The pleading of the notice is a condition precedent to the right of recovery. The supreme court said in *Vogel v. Thrifty Drug Co.*:<sup>85</sup>

The clear and practically unbroken current of authority, establishes the doctrine that the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right of recovery, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach. . . . Here, the original complaint, based on the theory of negligence, was filed May 23, 1951, and amended complaint based on the same theory was filed August 16, 1951, and it was not until May 1, 1952, the day of the trial, that the motion to file the amendment aimed at introducing a cause of action based on breach of warranty was presented to the court. The record shows no excuse for the tardiness in proposing the new cause of action which, though arising from the same transaction, would inject new issues of law and fact, and, more important still, as hereinbefore pointed out, the proffered amendment was defective in not pleading an essential element of the new theory of liability. Under such circumstances we cannot hold that the trial court abused its discretion in denying plaintiff's motion.

### *Failure May Be Raised on Appeal*

Failure to allege notice *can* be raised for the first time on appeal. The court said in *Burkett v. Dental Perfection Co.*:<sup>86</sup>

. . . The complaint contains no allegation and the transcript discloses no proof concerning a notice such as that specified in the second sentence of the section (section 1769, Civil Code). This is fatal to an action for breach of warranty. . . . The defect is such that it is cognizable on appeal or raised there for the first time. . . .

### *There May Be a Waiver*

However, the failure to plead notice can be cured if evidence of notice is admitted without objection. In *Odell v. Frueh*, the following appears:<sup>87</sup>

<sup>85</sup> 43 Cal. 2d 184, 188-89, 272 P.2d 1, 4 (1954).

<sup>86</sup> 140 Cal. App. 2d 106, 110, 294 P.2d 992, 995 (1956).

<sup>87</sup> 146 Cal. App. 2d 504, 512-13, 304 P.2d 45, 51 (1956).

Respondents neither alleged nor did the trial court find that notice had been given to the seller of his breach within a reasonable time after its discovery by the buyer as is required by Civil Code section 1769. The simple answer is that the complaint was never demurred to on this ground; and Mr. Frueh admitted on the stand without objection by his attorney that on the very day of the mishap he had been summoned to the construction site and informed of the damage caused by the formula. Even though a complaint is deficient in some material particular, if no objection is made to its defect and proof is introduced without objection upon the issue not pleaded, the insufficiency of the pleading may not be raised for the first time on appeal. . . .

### *Question of Fact—Question of Law?*

Whether or not notice was given within a reasonable time is a question of fact or a question of law is not clear. In *Webster v. Klassen*, the appellate court said: “. . . The question of reasonable notice was submitted to the jury under proper instructions and resulted in a finding against defendant’s contention. We are unable to hold as a matter of law, that any delay in giving notice was unreasonable.”<sup>88</sup>

In *Square Deal Machine Co. v. Garrett Corp.*, the court in discussing inspection and rejection of goods as not being in accordance with the contract (and incidentally as a breach of warranty) said:<sup>89</sup>

Appellant would have us hold here as a matter of law that respondent’s agents should have examined the gears immediately, counted the teeth, and discovered the defect. However, Civil Code, section 1767, contemplates “a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.” What constitutes a reasonable opportunity is always a question of fact to be determined according to the reasonable man’s standard by the trier of fact, in this case the jury.

But in *Davidson v. Herring Hall Marvin Safe Co.*, the court said:<sup>90</sup>

The fair inference from this language is that in the case of sales of goods other than foodstuffs “containing latent defects,” the court would regard a delay in giving notice of six months from the date plaintiff had knowledge of the breach as unreasonable as a matter of law. And such appears to be the failing uniform holding of the courts which had occasion to consider the question under statutes identical with our own, which is a counterpart of section 49 of the Uniform Sales Act. . . . In the foregoing cases, delays of from four to six months were held to be unreasonable as a matter of law.

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<sup>88</sup> 109 Cal. App. 2d 583, 592, 241 P.2d 302, 307 (1952).

<sup>89</sup> 128 Cal. App. 2d 286, 291, 275 P.2d 46, 50 (1954).

<sup>90</sup> 131 Cal. App. 2d 874, 876, 280 P.2d 549, 550 (1955).



The filing of the complaint is *not* in itself the notice required by the Sales Act.<sup>91</sup>

## VI. Expert Testimony in the Products Case

### *Comes Now Plaintiff to Court . . . But Not Alone*

In every form of warranty action, food, drug, or non-food product, the expert, factual or medical, or both, may be indispensable to the establishment of the essential element of proximate cause.<sup>92</sup> Plaintiff must still show the offensive condition was present in the product giving rise to injury and that injury occurred as a result of its use or ingestion.

As Belli put it in *Modern Trials*, 371, 375:

In this modern age, an "expert" may be found in any field, no matter how esoteric . . . . But whatever the difficulties incident to the use of experts, the modern trend is to accord more room for opinion evidence, often in fields heretofore held to be within the domain of law testimony alone . . . .

The drama of scientifically presented facts has captured and held the interest of jurors. No longer is a superficial understanding of the laws of natural phenomena, medicine, engineering, chemistry and

<sup>91</sup> *Arata v. Tonegato*, 152 Cal. App. 2d 837, 314 P.2d 130 (1957). Cases in which notice was held to be unreasonable as to time are as follows: *Davidson v. Herring Hall Marvin Safe Co.*, 131 Cal. App. 2d 874, 280 P.2d 549 (1955): fifteen months after discovery of breach. *Ice Bowl, Inc. v. Spaulding Sales Corp.*, 56 Cal. App. 2d 918, 133 P.2d 846 (1943): eight months after discovery of breach. *Silvera v. Broadway Dept. Store*, 35 F. Supp. 625 (S.D. Cal. 1940): seven months after discovery of breach. *Pacific Commercial Co. v. Greer*, 129 Cal. App. 751, 19 P.2d 543 (1933): seven months after discovery of breach. In the following cases the delay was held not to be unreasonable: *Maecherlein v. Sealy Mattress Co.*, 145 Cal. App. 2d 275, 302 P.2d 331 (1956). A year and a half after it developed that the mattress was "saggy and lumpy," but within a few days after the particular complaint that a spring came through and caused the injury. *Drabkin v. Bigelow*, 59 Cal. App. 2d 68, 138 P.2d 750 (1943). (NOTE: This is properly a matter of whether the buyer can rescind for breach.) Thirteen days. The case is of interest not from the time element but because the court holds that the right to rescind is not lost because the buyer gives the seller the opportunity to try and remedy the defect. *Steiner v. Jarrett*, 130 Cal. App. 2d 869, 280 P.2d 235 (1955). Thirty days. *Webster v. Klassen*, 109 Cal. App. 2d 583, 241 P.2d 302 (1952). Time element cannot be determined. Last and the most helpful case: *Whitfield v. Jessup*, 31 Cal. 2d 826, 193 P.2d 1 (1948). Notice given eleven months after sale and approximately three months after discovery of breach. The court held that what constitutes a reasonable time must be determined by the particular circumstances of the individual case. That the trial court erred in holding as a matter of law that eleven months was an unreasonable time.

<sup>92</sup> Neither depositions nor interrogatories involving potential structural, chemical, engineering, or other alleged deficiency or failure of a product as merchantable or fit for a purpose should be attempted without the most comprehensive review of the situation with one's experts. This is the real training ground for the impending contest. Spare the horses here, and you may never make it through the pass.

other related sciences sufficient. The modern trial lawyer must, to avoid the nauseating non-suit and maintain his "burden of proof" even to the appellate court, be knowledgeable and flexible in his appreciations of the expert's fields.<sup>93</sup>

Often the expert produces the "homely phrase" significant beyond all technical descriptions of a product failure. Recently one of my colleagues reported the "Case of the Exploding Steam Iron."<sup>94</sup> The plaintiff was severely burned. Until the expert arrived, just what had caused the explosion was pure speculation. Like any housewife, plaintiff had poured water into the steam iron and was in the process of using the device for the purpose for which it was intended—pressing clothes. What kind of expert in this type of case? A down to earth one—the fellow who day in, day out ran a repair shop for just these kinds of devices. Examination followed. Asked what he made of it, this investigator stated that he had seen "barrels and barrels of steam irons." What went wrong? "Why, this is a bomb!" Simply stated so no juror could miss it—when the water is poured into the iron, it is heated by an electric element after which the steam passes through a narrow, copper tube. If dirt clogs the tube, the steam is prevented from making exit—and BOMBS AWAY!

Sufficient for this discussion, the caution that counsel must be "fit for the purpose" intended, an armed adversary, and yet discreetly unobtrusive.

Withal, one must beware the intellectual approach accompanied by the "over-trained" expert intent on spreading his expertise over the courtroom on direct like an encyclopedic cloudburst, and on cross-examination in a "taffy pull" with opposing counsel. Too often in the "propose and oppose" of technical jargon the simple truth necessary to establish cause and effect may be lost. For example:—

In *Alexander v. Inland Steel Co.*,<sup>95</sup> plaintiff was injured when he fell as a welded steel sub-purlin, sold by defendant corporation to plaintiff's employer, cracked under his weight. The entire case turned

<sup>93</sup> Counsel in the so-called "Cutter Incident Cases," of necessity, had to acquire a very real understanding of the chemical nature of the Salk vaccine, virology, epidemiology, testing processes for live virus and be prepared to examine and cross examine some of the greatest living experts in the field.

<sup>94</sup> Kelner, *Expert Testimony in Products Liability Cases*, as reported in BELL, TRIAL AND TORT TRENDS, 158-173 (1959). See also: 62 A.L.R. 2d 1426, *Safety of condition, place or appliance as proper subject of expert or opinion evidence in tort actions*, (no different in warranty), and *Personal Injury Actions, Defenses, Damages, Manufacturers Liability for Harm Done by Product*, §§ 1.02, 1.05, (2). See also, *Preparation of the Products Liability Case*, 24 TENN. L. REV. 790 and *Presenting the Evidence for Products Liability Cases*, 825 (1957); *Advertised Product Liability: Proof of Product Defect*, 8 CLEV.-MAR. L. REV. 112 (1959).

<sup>95</sup> 263 F.2d 314 (8th Cir. 1958).

on whether the sub-purlins were welded in a proper and not a freezing temperature. Welding within certain temperature ranges may be defective. High carbon steel is not usually acceptable for welding. What happened? Plaintiff in a lengthy brief to the court, contended that there was evidence affording proof that the steel sub-purlins were likely to crack if they were spot welded in freezing temperature. *Where was the evidence?* It had to be in the total effect of the expert's testimony and the factual foundations laid. Was it there? Not in this court's opinion:<sup>96</sup>

Assuming arguendo that the sub-purlins possessed dangerous limitations when welded and when walked upon in freezing temperature, and that defendant had knowledge of this limitation; nevertheless there is no evidence from which it may be legitimately inferred that the sub-purlin in question was welded in freezing temperature and that as a direct result thereof it was caused to break.

How effective was this expert? Were his assumptions valid? Addressing itself to the testimony, we have this from the court:<sup>97</sup>

Dr. Rose testified that in his opinion "the weight of a 158-pound man applied in the vicinity of the center of the weld of this particular T-bar, *assuming that the weld was made and the weight was applied when the temperature was between 12 and 30 degrees F., could and did cause the bar to break or fracture . . .*" As to the effect of the temperature at the time of the welding, Rose testified: "Well, the temperature at the time of welding is not really of major importance—it would have some bearing, but I am not sure in my own mind that this is extremely important." (Emphasis added.)

Removing the case from further consideration and making plaintiff's day in the trial court a miserable one, the court concluded:<sup>98</sup>

. . . [N]o one can say without resort to speculation and conjecture that the weld was made under such conditions so as to render the sub-purlin unsafe . . . . In the absence of probative evidence to establish, even by inference, the existence of necessary and essential elements . . . it logically follows that such asserted limitation could not have been the proximate cause of the incident . . . .

The precious moments devoted to the presentation of the expert should not be used as a showcase or vehicle for display of the lawyer's talents. The intellectual process finds its most eloquent expression when contained in simplicity. Identification of the juror with the injured plaintiff is best achieved by treating him as one of the millions of consumers of American products, exposed to the same sales seduc-

<sup>96</sup> *Id.* at 322.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Id.* at 322-23.

tions and high promise of excellence, which induced plaintiff to buy the offensive product.

To paraphrase one of the most progressive of American courts, the expert you produce should not intrude rudely "like a belligerent wife crashing in on an assignation with a hussy," but more like the fellow next door who took the engineering course, learned something about testing methods and safety in products and now appears in court to outline the manner in which the product was or became defective, unmerchantable and/or unfit for the purpose for which it was intended. As in *Henningsen*, he may not know the precise defect or failure, yet the sum total of his testimony placed in the evidentiary hopper with other significant facts may be sufficient to create that degree of probative evidence adequate in quality to establish proximate cause.

Often a sense of humor, on cross-examination of the adversary's expert may lighten plaintiff's burden. In a recent case tried by this author (presently on appeal based on grounds other than proximate cause per se) this colloquy with the only factual expert seemingly was effective.

### *The Case of the Crawling Candy Bar*

In a situation where a famous name candy bar was claimed to be unwholesome and deleterious to health, (suit was for breach of warranty only) *defendants* introduced a well qualified entomologist, whose sole purpose was to establish that the *Interpunctella Plodia*, (Indian Meal Moth), was non-toxic, a common species found in a wide range of food products with a 200 year history in the United States. In his opinion the cultured materials were "not unfit for human consumption." In fact, insects were used as food; they were the basis of nourishment for populations of certain world areas. Bodenheimer wrote a book *Insects as Food* found in every scientific library. Admittedly, Indian Meal Moth was not being recommended as a general diet, but only because their size made it economically unfeasible. Experiments were nevertheless being carried on.

Having once failed to "get it in," counsel tried again to give the expert an early lunch:

Q. Have you raised clean colonies of Indian Meal Moth larvae and eaten them yourself?

A. I have eaten them myself, and . . .

Counsel for plaintiff made vigorous objection followed with the comment: "What would it prove,—his stomach is a little better than Mrs. \_\_\_\_\_?" The objection was sustained.

Cross-examination by plaintiff's counsel is taken directly from the transcript. It is reported in some of its parts as follows:

Q. The webbing on the chocolate, Mr. \_\_\_\_\_, that is characteristic of the Indian Meal Moth larvae, is it not?

A. Yes, it is.

Q. And the whitish substance that you see, the Indian Meal Moth Larvae also leave fecal matter . . . ?

A. Yes, so-called fraes.

Q. And it has legs and crawls?

A. Yes. It has six legs and migrates very slowly.

Q. When the mama moth finds a nice chocolate bar, and she wants to put her eggs on it, she can deposit as many as four hundred eggs at one laying, if I may use the expression?

A. It would have to be an extreme—your statement, I think is accurate, but I would say from fifty up to maybe a maximum of four hundred.

Q. Depending on how big the mama moth is?

A. Well, depending upon how well nourished she was, temperature, humidity and . . . other factors.

Soliciting an answer regarding insects as food experiments, counsel inquired as to whether the witness, of his own experience and knowledge knew of any recommendation that we should feed "our Armed Forces—our soldiers—*bugs*?" Multiple objections were voiced to the use of the term "bugs."

MR. H\_\_\_\_\_: Object, to the use of the word "bugs." The word is "insects."

THE COURT: I don't know. I always heard the entomology department out there at California is the bug department. Isn't that right?

THE WITNESS: You didn't major in entomology, sir. *Other* departments call us that, yes.

THE COURT: Well, wasn't E\_\_\_\_\_ the head of the bug department out there?

THE WITNESS: Yes.

THE COURT: That is what everybody knew him as, the head of the bug department. All right.

The witness having offered insects as good protein food, the examination continued in this vein.

Q. I take it, sir, you are around these—pardon the expression—insects all the time during your busy life as a good entomologist?

A. I spend a good deal of time with them.

Q. They become kind of friendly people to you?

A. We are not emotionally attached.

Q. I didn't mean there was any romance involved. They are things you are familiar with, just as allegedly lawyers are familiar with the courtroom?

A. Oh, yes.

Q. Would you not say that as a person who has become acclimated to the presence of insects and other crawling life, larvae, that you are somewhat different than the ordinary human being who doesn't live in that atmosphere, and your attitudes are different?

A. Well, I would say I am much more familiar and relaxed with them.

\* \* \* \* \*

Q. Do you know of any chocolate manufacturer in the United States who has come to your attention where, in addition to the ingredients of the true chocolate itself, there are added to the ingredients any form of larvae or insect life?

A. What do you mean, *purposely* added? (Emphasis added.)

Q. Yes.

A. I know of no deliberate adding of insects to any candy bar by manufacturers.

Recess approaching, counsel framed a "calculated risk" question.

Q. If you had a candy bar, sir, that you might occasionally purchase for yourself, asking for your life experience . . . and you saw the bugs on the candy, excuse me, I mean insects--and these things were crawling out of the chocolate or the nuts involved, would you consider such a bar of candy fit for human consumption by other people as well as yourself?

Objection having followed for failure to include in the question the phrase, "Indian Meal Moth Larvae," the phrase was adopted in the question.

Q. Having in mind the suggestion offered by my colleague, that we are discussing Indian Meal Moth Larvae, and such other things as we have described, webbing, white matter, and feces of the larvae in and about the chocolate, with that addendum, sir, what do you say?

A. . . . my first reaction would be to return the candy bar and get a fresh one.

Q. BUT YOU WOULDN'T EAT IT, SIR?

A. Depends on the situation. If I was extremely hungry and it wasn't --the situation wasn't such that I could return it readily, I would *consider* eating it. Also depends upon whether I found one larva or whether it was crawling away from me, the entire bar. But generally speaking, if I found a bar that had a number of larvae on it, *I think I would not eat it*. I would return it and ask for another. (Emphasis added.)

The expert having been established as human and economy minded first, and a "bug man" only when in his laboratory, he was excused. The jury did not conclude that bugs, protein or not, were fit for human consumption or that they added to the nutriment of either the chocolate or the nuts.

## **Henningsen: A Landmark Case Established By an Insurance Company Appraiser**

With the very instrumentality charged as the precipitating and proximate cause no longer available (the front of the car and steering mechanism were completely demolished), counsel for plaintiff faced the unenviable task of proving cause and effect first, from the testimony of Mrs. Henningsen<sup>99</sup> and next, from the answer to a hypothetical question put to plaintiffs' insurance carrier's inspector and appraiser, Mr. Jones. Jones' testimony and his qualifications were bitterly attacked by defendants, and yet it was *this* testimony which proved the breach of warranty of merchantability without which *Henningsen* might never have taken its memorable place with *McPherson*.

Having experienced through the years the knotting of the intestinal tract, one can almost relive counsel's concerns as he proceeded with his expert's testimony which was finally characterized by the court as admittedly not "entitled to very much probative force." But it was enough. It was simple, uncomplicated, understandable and carried conviction to a jury which must have understood, that barring the positive intervention of the driver, new Plymouths don't go off the road after 468 miles of driving unless "something went wrong in New Jersey."

With the transcript before us through the gracious courtesies of counsel for the plaintiffs,<sup>100</sup> we reproduce selected parts which wittingly, or otherwise, answer the oft put inquiry—how do you prove a

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<sup>99</sup> The court in its opinion with regard to Mrs. Henningsen's experience moments before her injury summarized it this way: "She (Mrs. Henningsen) was proceeding north on Route 36 in Highlands, New Jersey, at 2-22 miles per hour. The highway was paved and smooth, and contained two lanes for northbound travel. She was riding in the right-hand lane. Suddenly, she heard a loud noise 'from the bottom by the hood.' It 'felt as if something cracked.' The steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall. No other vehicle was in any way involved. A bus operator driving in the left-hand lane testified that he observed plaintiff's car approaching in normal fashion in the opposite direction; 'all of a sudden (it) veered at 90 degrees . . . and right into this wall.' *As a result of the impact the front of the car 'was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident.'* The condition was such that the collision insurance carrier, after inspection, declared the vehicle a total loss. It had 468 miles on the speedometer at the time." (Emphasis added.) 161 A. 2d 69, 75 (N.J. 1960). Plaintiff came to trial with counts in negligence, express and implied warranties. The case was finally submitted to the jury on breaches of the implied warranties of merchantability. Negligence was withdrawn from the jury's consideration by the court.

<sup>100</sup> Counsel for plaintiffs were Messrs. Bernard Chazen, Nathan Baker of Baker, Garber & Chazen, Hoboken, N.J., and Carmen C. Rusignola and Martin Itzikman of Newark, N.J.

products case when the very defect claimed is either burned to a crisp, demolished, disintegrated or otherwise destroyed?

As foundation for the hypothetical question to the expert, these basic proofs were adduced:

1. After servicing and delivery of the car by the dealer, Bloomfield, it operated normally for the succeeding ten days so far as plaintiffs were concerned.
2. No difficulties or mishaps had been encountered.
3. It neither had nor required any servicing during this period.
4. Only the Henningsens drove the car.
5. The owner's service certificate provided for return for further servicing at the end of the first 1000 miles—less than half of which had been covered at the time of Mrs. Henningsen's injury.
6. On the day of the accident, Mrs. Henningsen was driving in normal fashion, on a smooth highway.
7. Unexpectedly and without warning, the front wheels of the car went into bizarre action as described above.
8. The destruction of the steering mechanism was complete.

Called as an expert, Mr. Jones revealed that he was "an inspector of wrecked and damaged automobiles for some eleven years." At one time he ran a garage, following Army service during which he was rated as a mechanic. His present job consisted of making estimates on damaged cars.

Q. And does that require a familiarity with the working parts of the car as well as the exterior of the vehicles?

A. Yes, it does.

Q. And you were doing that in May, 1955?

A. Oh, yes.

Q. Sometime in May of 1955, did you have occasion to examine a 1955 Plymouth sedan that was involved in an accident . . . ?

A. If you have my inspection there, I could refresh my memory with it.

At this point, counsel for Chrysler made inquiry as to whether Mr. Jones was "*being offered as some kind of an expert.*" Conceding Mr. Jones was qualified to testify to the value of the damage and the repair bill, cross-examination was requested if the witness was being offered for any other purpose. Plaintiff's counsel offered the witness without qualification for acceptance of the hypothetical question "as to the probable condition of the car." The court granted inquiry by counsel for Chrysler. It followed in part in this manner:

Q. What is the formal training you have?

A. I had three and a half years in the service in formal training. I ran my own shop after that for over three years.



- Q. Mr. Jones, by formal training I mean schooling. Are you an automotive engineer?
- A. No, I am not an automotive engineer.
- Q. And in the service, were you in the Transportation Corps of the Army?
- A. No, I was in repairing.
- Q. And what did your job involve, repairing the trucks and vehicles?
- A. Army vehicles, passenger cars, tractors, tanks, half tanks, all kinds of vehicles the Army had in our division.

After establishing that Jones in his own shop did private repairs on passenger vehicles and trucks . . . some three years . . . .

- Q. And after that you went into the appraisal business?
- A. Yes, sir.
- Q. And how long have you been in the appraisal business?
- A. Eleven years this month.
- Q. During the last eleven years, have you done any repair work or confined your activities as an appraiser?
- A. Just appraisal work.
- \* \* \* \* \*
- Q. And that has been your experience for the last eleven years?
- A. That is right.
- Q. Has it been your experience in the last eleven years . . . to express opinions regarding failures in metal or metallurgy or parts or anything like that?
- A. Yes, I've had some training in that in the last eleven years.
- Q. Do you understand metallurgy?
- A. No, not into it that deep, sir, but I understand—we are schooled when the new cars come out what's on them, what's in them, and how they're made, and anything different from the last year's, and we have to know that.
- \* \* \* \* \*

Upon redirect, various photographs of the wrecked car being introduced, this colloquy followed in part:

- Q. Mr. Jones, did you make a thorough examination of this vehicle at that time?
- A. I did what I could, due to the condition of the car . . . it took us a good forty-five minutes to an hour to look at this car.
- Q. Did you examine the mechanical parts or attempt to examine the mechanical parts that were damaged?
- A. Yes, sir, we attempted to.
- Q. Were you, from your examination, able to ascertain what parts, if any, were damaged or broken prior to this accident? (Objections on various grounds overruled.)
- A. No.
- Q. Why couldn't you determine the condition of the car?
- A. Sir, this car was hit so hard that everything—the right front of the vehicle in back was completely smashed in. It was impossible to

determine whether there was any prior damage or not in the automobile. Due to the impact, everything was broken under there.

\* \* \* \* \*

- Q. Can you, to a reasonable degree of certainty, state whether or not a car going twenty to twenty-five miles an hour, striking the narrow end of a stone wall, would sustain the damages indicated in these pictures, which you saw upon examination of this car?
- A. When I looked at this car I didn't know what it hit or where it happened or anything, but I knew it hit something that was a non-movable object, such as a culvert or stone wall or . . . it didn't hit another vehicle, because the impact was terrific. If it hit another vehicle it would be less of an impact unless it was going at tremendous speed, but this was just like hitting this wall here . . .

Came now the big question. Precluded by answers to interrogatories from claiming any *specific defect of a specific part or parts*, the hypothesis offered was clearly limited to solicit opinion solely as to whether on the facts the accident was caused "*by mechanical defect or failure*" of the automobile. Defense counsel objected vigorously. Counsel for plaintiff urged the court to note the distinction between testimony as to a *specific part* and mechanical defect in general. "We are asking him . . . to tell us *whether or not this accident could have happened except for a mechanical defect.*" The court allowed it, stating: "The weight to be given to the answer is for the jury."

At the close of the hypothetical narration the precise question was put:—

- Q. Do you have an opinion, *to a reasonable degree of certainty*, as to whether or not a mechanical defect or failure caused this accident?
- A. I think I have, sir . . . you are only interested in this one, and that's the only way I can base my opinion, and that is *definitely something had to go wrong from the steering wheel down to the front wheels. A number of things could happen and definitely something must have happened there.* (Emphasis added.)

Cross-examination was calculated to solicit from the witness a variety of "possibilities" and to press jury conclusions that no probabilities in fact having been established, proximate cause was out the courtroom window.

Upon cross-examination by counsel for Chrysler:

- Q. You were asked a hypothetical question. You said a number of things could have happened, something had to go wrong; a number of things could have happened; is that right?
- A. Yes, sir, that's right.
- Q. Now, these things that could have happened, that must have happened, include what?

- A. Well, I was just sitting here trying to think how many different moving parts you have from the steering wheels and I can't count them all . . . the tie rod could have dropped off the pitman arm. That could have happened. . . . Something down there had to drop off, break loose, to cause the car . . . it could have gone either one way or the other . . . .

Pressed for other possibilities, the questions followed:

- Q. Just tell me how many other possibilities there are.  
A. I would say a good three or four.  
Q. When you mentioned the tie rods, that was merely a possibility?  
A. Yes, sir.  
Q. You don't know or believe that the tie rods probably came off?  
A. *I wouldn't venture to make an opinion of what happened to this automobile, because I don't know what actually happened.* (Emphasis added.)  
\* \* \* \* \*  
Q. Now, these explanations or assumptions that you think could have happened are merely possibilities, isn't that right? You don't know what probably happened here?  
A. No, I don't know what *actually* happened.  
\* \* \* \* \*  
Q. Do you have a probable cause of the happening of this accident, to the exclusion of all other causes?  
A. *I say that something definitely happened, not probably.* (Emphasis added.)  
\* \* \* \* \*

As to whether the crash occurred due to some latent defect within the metal of one of the parts, the witness had no knowledge, nor did he venture testimony as to "what was built inside the steering column, or the tie rods, wheels, or brake drums." As to the Plymouth steering column, he approximated "thirty, forty different parts calling for washers, nuts and gaskets." Shown a blowup with various parts exhibited, he was asked:

- Q. Could it be in one of those parts, a failure in one of those parts?  
A. It could.  
Q. *That* could possibly cause it?  
A. Yes, sir.  
Q. Now, among these possible causes you believe account for the happening of this accident, a matter of a service adjustment figures also, doesn't it? That is within the possibilities? . . .  
You have stated that in your opinion this car went off the road the way it did because something went wrong?  
A. Yes.  
Q. And you said there are many possible things that could have gone wrong?  
A. That's right.

Q. And among these possibilities are servicing items . . . ?

A. Yes.

Q. As distinguished from manufacturing items?

A. Yes.

Q. . . . Among those possibilities could be a defective part from the original installation or a matter of some failure to service properly; isn't that correct?

A. Yes. (Witness excused.)

At the close of the evidence, motions for judgment were pursued by Bloomfield and Chrysler. These were rejected.

If we may indulge in an observer's speculation, it would appear that defense counsel, like some American courts, were confusing proof necessary to establish negligence with proofs sufficient to establish breach of warranty where no proof of negligence is or should be required.<sup>101</sup> The supreme court, reviewing the total effect of this less than crisp testimony held:

. . . [T]he total effect of the circumstances shown from purchase to accident is adequate to raise an inference that the car was defective and that such condition was causally related to the mishap (citing cases) . . . . *In our judgment, the evidence shown, as a matter of preponderance of probabilities would justify the conclusion by the ultimate triers of the facts that the accident was caused by a failure of the steering mechanism of the car and that such failure constituted a breach of warranty of both defendants . . . .* It may be conceded that the opinion of the automobile expert produced by the plaintiffs in the present case was not entitled to very much probative force. However, his assertion in answer to the hypothetical question . . . cannot be rejected as a matter of law. (Emphasis added.)<sup>102</sup>

Thus, *Henningsen* became "one for the books."

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<sup>101</sup> *Manzoni v. Detroit Coca Cola Bottling Co.*, June 28, 1961. Oct. 23-24, Michigan Supreme Court. Holding warranty does not require a showing of negligence, though if it be shown, will not preclude the existence of a warranty. The consumer has an election of remedies. "We are holding that in a suit in warranty it is not necessary to show negligence, but rather breach of implied warranty and that such warranty is available to all who may suffer damage by reason of their use (of the product) in the legitimate channels of trade."

<sup>102</sup> *Knapp v. Willys-Ardmore, Inc.*, 174 Pa. Super. 90, 100 A.2d 105 (1953); Liability predicated on breach of warranty. An auto mechanic gave some testimony from which it might be inferred that the tie rod which had become disconnected and dropped to the ground had been broken before the impact of an automobile with a pole. Like the *Henningsen* car, it veered to the right over a curb and into a pole. The language of the court is significant.

HELD: The facts created a reasonable inference that the car was defective when delivered (it had 107 miles of travel) and that the defect was not caused by subsequent conduct of the plaintiff . . . that while existence of a defect cannot be found on conjectures or guess, *yet it is not necessary to exclude every other possible cause which the ingenuity of counsel might suggest.* (Emphasis added.)

Manifold examples of the crucial contributions of the medical expert could be exemplified here did space and time permit. In *Twombly v. Fuller Brush Co.*,<sup>103</sup> the court discusses the testimony by plaintiff's expert, an eminent toxicologist, at great length concluding that the plaintiff's hepatitis was caused by inhalation of tetrachloroethylene fumes, which though not as dangerous as tetrachloride, had great potential for physical insult when used under pressure in a spray can.

In *Rauch v. American Radiator & Standard San. Corp.*,<sup>104</sup> plaintiff employed an expert to prove that the original defect occurred at the factory and that the explosion of a water heater was caused by a defective safety pilot valve.

In *Gottsdanker*, both children involved contracted poliomyelitis shortly after being inoculated with Salk vaccine manufactured by defendant. It was the testimony of medical experts for the plaintiff which established live virus in the vaccine as the direct cause of the injuries and eliminated any other potential cause. The court was satisfied that there was "substantial evidence to sustain a finding that the vaccine contained live virus of poliomyelitis, and that the injected vaccine caused the disease in each child."

## VII. Instructions

### *"I Instruct You, Ladies and Gentlemen of the Jury, That . . ."*

Surely volumes could be written of the tragic reversals based often on a single erroneous instruction. This section is not intended as a "do it yourself" kit of ready-made instructions to be lifted from a "warranty" grab-bag. Too often, when the case suddenly is off the "trailing calendar" and a present reality, even counsel considered competent will reach for the mimeographed formula instruction file, and away he goes! No trial man has missed the terrifying trauma of the devastating instruction literally shattering his client's cause. In California, where lawyers are entitled as a matter of right to a conference with the judge on instructions to be given, nothing should be spared in disabusing the judge of any developed conviction regarding an instruction lacking integrity in the law.<sup>105</sup>

Presently the West Publishing Company, in cooperation with a committee of learned judges of the Los Angeles Superior Court and leaders of Los Angeles Bar, are preparing for publication Jury Instructions on Breach of Warranty. These will be based on relevant

<sup>103</sup> 221 Md. 476, 158 A.2d 110 (1960).

<sup>104</sup> 103 So. 2d 603 (Fla. 1958).

<sup>105</sup> CAL. CODE CIV. PROC. § 608.

provisions of the Uniform Sales Act and interpretations of California and other courts. The aim is for uniformity in all states.

In preparing the warranty instructions, it is well to remember the importance of having statutory and other terms defined for the jury. Words such as "Buyer," "Seller," "Sale," "Express Warranty," "Implied Warranty," "Proximate Cause," "Notice of Breach," and "Privity" should, with specific code sections in mind, be set forth clearly. California law having expanded into the protection of the employee of the employer-vendee in the non-food case, special instructions will have to be framed where the facts fall within the framework of the *Peterson v. Lamb* decision.

From whatever source the alleged breach of warranty may arise, instructions must be personalized and planned, within the applicable law, to concentrate the juror's attention on the relevancy of the law to the facts as proved and the theory of the case. Much ado is made during "voir dire" in soliciting the juror's assent to "follow the law as it will be given you by the court." Even more important is that the instructions ultimately given create understanding and not confusion and that one portion of argument be employed intelligently to emphasize that the juror's oath requires of him the strictest adherence to applicable law lest he "take the law into his own hands." Not very "green is my valley" should some strong juror permit a valid warranty case to fail because strict liability is distasteful to him, or that he insist on a showing of negligence to sustain a breach of warranty. (Sample instructions appear in Appendix B to this article—editor.)

### VIII. Conclusion

How can one approach a "conclusion" in an area where new frontiers are being created daily? There are those who would stifle the voices reaffirming the common law's finest hours only as it expands with reason, only as it lives and breathes and grows in response to the needs of the community and the development of the nation.<sup>106</sup>

<sup>106</sup> Dissenting in *Dalehite v. United States*, 346 U.S. 15, 51 (1952), the late Mr. Justice Jackson, expressed a basic theme about which enlightened American courts have woven a symphony of dedication to the social concept of "let the buyer be protected." Said the learned Justice: "We . . . cannot avoid consideration of the basic criteria by which courts determine liability in the conditions of modern life. This is a day of synthetic living . . . .

. . . A dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well being. *Purchasers cannot try out drugs to determine whether they kill or cure.* Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames . . . . Where experiment or research is necessary to determine the presence or the degree of danger, *the*

While the symphony "sounds" in tort, the basic theme is trumpeted in the subtle strains of contract, where generated genealogies of fictional origin, sordid as the result may be, determine liability in the warranty concerto. Under this concept, the remote manufacturer of a non-food product, whose negligence may be buried in the deepest vaults of his secret formulas and intricate fabrication methods, can with poised assurance approach the victim of his defective product (a non-vendee—distant cousin in the chain of users) and say: "I never heard of you in my life and most certainly never warranted my product to the likes of you. If you want to get yourself messed up, old boy, you can just charge it off to *your* experience and not *mine!*"

Assuming the existence of defect (breach of warranty), proximate cause and damage, is the problem in warranty to be—"tell me *who* got hurt, and I'll tell you whether he can recover"? And does it depend further upon the philosophy and disposition of a particular court, liberal or conservative, as to whether, when the chips are down, one may discover the "hard case" user, may inherit a formula fiction to aid him, or, alternatively, some legal cliché to send him bouncing down the courthouse steps, crutches and all?

Apparently *Peterson* was no lamb to be sacrificed on the privity altar, but that's only because he knew the boss and the boss bought him a grinding wheel, which prevented the "remote manufacturer" from getting too remote from the implied warranty liability circle. But suppose that instead of *Peterson*, it was some "business invitee" walking through the plant? How is he going to look trying to "stand in the employer's shoes"? Are they going to be a little too tight? How are you going to squeeze him into the "industrial family" (or make him a successor in "privity") when the manufacturer has more relatives than he allegedly can handle now? Will our court find room for

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*product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers.*" (Emphasis added.) Eight years later, the New Jersey Supreme Court, dealing strictly with *warranty* rather than negligence, echoing MacPherson and adopting the principle that "precedents drawn from the days of travel by stage-coach do not fit the conditions of travel today," observed that: "Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend upon the 'intricacies of the law of sales.' The obligation of the manufacturers should not be based alone on privity of contract. It should rest, as we once said, upon 'the demands of social justice.'" *Henningsen v. Bloomfield Motors*, 161 A. 2d 69 (N.J. 1960) a monumental sequel to MacPherson.

this victim by determining that it is a "matter of common knowledge" that grinding wheels when defectively made may explode and strike anyone within the area of their pyrotechnics indiscriminately?

Will the "public policy" considerations requiring that only wholesome food and drugs be sold for human consumption in California cease if the traumatizing instrumentality turns out to be the flaming torch of the incinerating nylon skirt? Or the defective tire which catapults the car and its non-privacy passenger to kingdom come? If the implied warranty is one *imposed by law* regardless of the wishes of the manufacturer, what "illusory comfort" is there in finding the law firm in its demands upon those who furnish products for human consumption, and vacillating (that's hardly the word when the majority of American courts deny recovery in implied warranty, absent privacy) as to those who create defective products which are for "human use."<sup>107</sup>

You can't write a "conclusion" with *Peterson* alone when *Garon*<sup>108</sup> brings some new "relatives" into the charmed circle of the manufacturer's family. Of course, at this moment Garon's intestate is a deceased relative only by courtesy of the Los Angeles Superior Court, which has brought him into the "*commercial family*" of the airline and thus in privity with the manufacturer of the aircraft alleged to have caused the crash. Who would not agree that a latent defect in a high-speed airplane constituted a foreseeable hazard? If the appellate court will "apply the holding in *Peterson*" as did Judge Balthis, below, the trial court will find justification for its appreciation that "in California, the trend is against the strict application of the requirement of privacy."

Out where the "tall corn grows," the Kansas court didn't resort to wandering about the prairie in the "privacy patch," scanning the earth for some convenient "exceptions" in order to make available an implied warranty of fitness to the deceased guest of the purchaser of a "Life Saver" tubeless tire which blew out suddenly, killing both. Said the court:<sup>109</sup>

It [implied warranty] is an obligation raised by the law as an inference from the acts of parties or the circumstances of the transaction and

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<sup>107</sup> *The Status of the Rule Requiring Privacy in Breach of Warranty Actions*, 10 HASTINGS L.J. 418, 425-26, wherein it is stated: "... these cases represent an unfortunate trend in the law insofar as they grant or deny recovery on the warranty depending on the existence of privacy . . . . Once having accepted the exception to the rule in the case of foodstuffs as a matter of policy there seems to be little grounds for restricting it as applied to cases of other kinds. Certainly there is no justification for the distinction to be found in the Sales Act itself . . . . It is hard to believe that there is a policy favoring a man's stomach to the exclusion of the rest of his body."

<sup>108</sup> *Garon v. Lockheed Aircraft Corp.*, Calif. Super. Court, Los Angeles County, reported Aviation Cases No. 17:148 (284:134. 6-27-61), Decided May 29, 1961.

<sup>109</sup> *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501, 504 (10th Cir. 1959). See excellent discussion in 25 NACCA L.J. 84 (1960) with many additional cases in point cited.



*it is created by operation of law* and does not arise from any agreement in fact of the parties . . . . Under Kansas decisions privity of contract is not essential where an implied warranty is imposed by the law on the basis of public policy. (Emphasis added.)

Liability without fault is not an alien doctrine in American law. There are those abroad who, while expressing the greatest of human sympathy for the person injured without fault, have suggested that the loss "must lie where it is found—unless that loss can be predicated upon fault."<sup>110</sup>

We are involved, despite the illuminating and increasingly evident judicial concerns for public health and safety, with two opposing judicial concepts in the non-food case: "*Liability Without Fault*" (with absolute demand for privity) versus "*Public Protection to the Ultimate Consumer or User Injured Without Fault*." Though the "Assault Upon the Citadel of Privity" is proceeding in these days apace, the castle has not been stormed, though we hear it judicially whispered that the beleaguered resistance forces may be running out of ammunition.

## APPENDIX A

### (Pleadings)

#### ACTION AGAINST MANUFACTURER FOR PERSONAL INJURIES CAUSED BY NEGLIGENCE IN THE MANUFACTURE OF PRODUCT (TITLE OF COURT AND CAUSE)

Plaintiff complains of defendant and alleges that:

#### I

Defendant is a corporation doing business under and by virtue of the laws of the State of California, with a principal place of business in the City and County of San Francisco.

#### II

On or about the 23rd day of September, 1960, plaintiff purchased, in the City and County of San Francisco, a 1960 "Super Duper Special" Two-Door Sedan, bearing Serial No. 666, manufactured by defendant.

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<sup>110</sup> Warren Freedman, of New York City, one of the most vocal of "counsel for the defense" in products cases (ex.: FREEDMAN, ALLERGY AND PRODUCTS LIABILITY, 1961), while expressing human sympathy and understanding for any person or child who, without fault, sustains any injury or disease proximately caused by the use of a consumer product, takes the California court to task in a "no holds barred" critique of the Cutter decision. It's got everything from "alien no fault doctrines" to "foisting responsibility upon a welfare or a paternal government." But one thing is missing—the unqualified gratuitous statement of the jury as to the reason for its decision: that "Cutter came to market with *live virus* in its poliomyelitis vaccine" and that the injection which was intended to prevent, caused the disease.

## III

That defendant so negligently and carelessly constructed, manufactured, assembled, inspected and serviced the said automobile as to allow the braking system to fail to function.

## IV

By reason of the premises, while plaintiff was driving said automobile on the 25th day of September, 1960, in a northerly direction on Fillmore Street south of its intersection with Broadway, in the City and County of San Francisco, State of California, the brakes of said automobile failed to function, and said automobile was precipitated rapidly down a steep hill; that by reason of the failure of brakes, as aforesaid, and as a proximate result thereof, plaintiff's automobile struck and collided with an automobile proceeding in an easterly direction on Vallejo Street in said City and County, and plaintiff was thrown in and about his automobile and sustained the injuries and damages hereinafter set forth.

## V

By reason of the premises, plaintiff sustained the following injuries: Fracture of the skull, injury to the brain and nervous system, fractures of the fourth and fifth cervical vertebrae, with damage to the adjacent muscles, ligaments, and nerves, and other injuries not presently diagnosed fully the allegations of which plaintiff prays leave to insert by amendment when ascertained.

## VI

By reason of the premises and the injuries as aforesaid, plaintiff was required to and did employ physicians, surgeons, and nurses to examine, treat, and care for him, and did incur medical and incidental expenses, including hospital expenses, x-ray expenses, ambulance expenses, and other expenses in an amount not now known to plaintiff, and plaintiff is informed and believes and upon such information and belief alleges that he will be required to expend further sums for such medical and hospital treatment and expenses. Plaintiff will ask leave of the Court to amend this Complaint to insert herein the true amount of such expenses when the same have been ascertained.

## VII

Plaintiff, an able-bodied worker capable of and earning approximately \$550 per month, was, by reason of the premises, unemployable and may in the future be unemployable, to his damage in an amount not fully determined. In this regard plaintiff prays leave to insert his damages by amendment when ascertained.

## VIII

By reason of the premises, plaintiff has been generally damaged in the sum of \$350,000.

WHEREFORE, plaintiff prays judgment against defendant:

1. For general damages in the sum of \$350,000;
2. For special damages as prayed for herein;
3. For costs of suit; and
4. For any further meet relief.

**ACTION FOR BREACH OF WARRANTY BY USER OF HAIR  
DYE AGAINST MANUFACTURER WHERE NO PRIVACY OF  
CONTRACT EXISTS. EXPRESS WARRANTY BY ADVERTISEMENT  
(TITLE OF COURT AND CAUSE)**

**I**

At all times herein mentioned, defendant WONDER DYE was a corporation doing business under and by virtue of the laws of the State of California, with a place of business in the City and County of San Francisco.

**II**

At various times during the year 1960, defendant WONDER DYE caused to be published in the Woman's Home Companion, Saturday Evening Post, and other media of national circulation advertisements reading in part:

"Attention, Ladies—Why have dull, dingy hair? With Wonder Dye you can safely and skillfully do a professional job on your own hair. Contains no harmful substances."

That said representations were made by defendant to induce women to purchase Wonder Dye and with the intention that the purchasers should rely thereon.

**III**

That during the year 1960, defendant placed on the market for purchase by consumers a product called "Wonder Dye," packaged in bottles; that said bottles contained directions for the use of Wonder Dye and the statement:

"Wonder Dye, if used in accordance with these directions, will color your hair in a professional-looking manner. No special training required—Wonder Dye contains no harmful substances."

That said representations were made by defendant to induce women to use the product and with the intention that they should rely upon said representation.

**IV**

That on or about the 23rd day of September, 1960, plaintiff, in reliance upon the representations and warranties of defendant as set forth in Paragraphs II and III herein, purchased a bottle of "Wonder Dye" and used it in accordance with the directions contained on the label of said bottle; that said dye contained harmful substances and that as a proximate result of the use of said dye, plaintiff's hair was caused to fall out, and plaintiff sustained the injuries and damages hereinafter set forth.

**V**

By reason of the breach of warranties set forth in Paragraphs II and III herein, and the injuries proximately resulting therefrom, plaintiff incurred expenses for medical treatment and hospitalization of the reasonable value of \$1,293.67, and has been damaged in said sum; that plaintiff is still under medical care for the treatment of the injuries sustained as aforesaid, and prays leave to insert herein her total damages in this respect when the same are finally determined.

**VI**

By reason of the premises and by reason of the breach of warranty described in Paragraphs II and III, and as a proximate result thereof, plaintiff

has suffered the permanent loss of hair, disfiguring scars about the face and scalp, pain, shock, and suffering, to her general damages in the sum of \$50,000.

## VII

That on or about the 10th day of November, 1960, and prior to the commencement of this action, plaintiff gave to defendant written notice of the breaches of warranty herein complained of.

WHEREFORE, plaintiff prays judgment against defendant, etc.

## ACTION AGAINST RETAILER FOR BREACH OF WARRANTIES OF FITNESS AND MERCHANTABILITY IN SALE OF HAIR DYE (TITLE OF COURT AND CAUSE)

Plaintiff complains of defendants and alleges that:

### I

Defendants DOE are sued pursuant to the provisions of Section 474, C.C.P.

### II

At all times herein mentioned, EAGLE DRUG COMPANY was a corporation doing business under and by virtue of the laws of the State of California, with a principal place of business in the City and County of San Francisco, State of California.

### III

At all times mentioned herein, defendants FIRST DOE and SECOND DOE were employees of defendant EAGLE DRUG COMPANY, acting within the course and scope of their employment.

### IV

On or about the 23rd day of September, 1960, in the City and County of San Francisco, plaintiff purchased a bottle of hair dye; that at said time and place, plaintiff made known to defendants EAGLE DRUG COMPANY, FIRST DOE and SECOND DOE the purposes for which said dye was required, i.e., to be used by plaintiff in the dyeing of her hair. That defendants impliedly warranted said hair dye to be fit for such purpose. That in reliance upon defendants' skill and judgment, plaintiff purchased said hair dye.

### V

That said hair dye was in fact not fit for use for its intended purpose, and as a proximate result of the breach of said warranty of fitness, plaintiff, in the use of said hair dye, suffered loss of hair and sustained the injuries and damages hereinafter set forth.

### VI

By reason of the breach of said warranty of fitness and the injuries proximately resulting therefrom, plaintiff incurred expenses for medical treatment and hospitalization of the reasonable value of \$1,293.67, and has been damaged in said sum; that plaintiff is still under medical care for the treatment of the injuries sustained as aforesaid, and prays leave to insert herein her total damages in this respect when the same are finally determined.

## VII

By reason of the premises and by reason of the breach of warranty of fitness described in Paragraph IV herein, and as a proximate result thereof, plaintiff has suffered the permanent loss of hair, disfiguring scars about the face and scalp, pain, shock, and suffering, to her general damage in the sum of \$50,000.

## VIII

That on or about the 10th day of November, 1960, and prior to the commencement of this action, plaintiff gave to defendants written notice of the breach of warranty herein complained of.

**AS AND FOR A SECOND, SEPARATE, AND DISTINCT CAUSE OF ACTION, PLAINTIFF ALLEGES:**

### I

Repeats as though set forth at length herein each and every, all and singular, all the allegations of Paragraphs I, II, III, VI, VII and VIII of the First Cause of Action.

### II

That on the 23rd day of September, 1960, plaintiff in the City and County of San Francisco, State of California, purchased from defendant EAGLE DRUG COMPANY, through its employees FIRST DOE and SECOND DOE, a bottle of hair dye known as "Wonder Dye." That defendants impliedly warranted that said hair dye was of merchantable quality.

### III

That said hair dye was not of merchantable quality, and as a proximate result of defendants' breach of warranty, plaintiff, in the use of said hair dye, suffered the loss of her hair and sustained the injuries and damages hereinafter set forth.

WHEREFORE, plaintiff prays judgment against defendants:

1. For general damages in the sum of \$50,000;
2. For special damages as prayed for herein;
3. For costs of suit herein; and

For any other and further meet relief.

**BREACH OF EXPRESS WARRANTY, BREACH OF  
IMPLIED WARRANTY OF FITNESS, BREACH OF IMPLIED  
WARRANTY OF MERCHANTABILITY, NEGLIGENCE,  
VIOLATION OF FEDERAL STATUTE, VIOLATION OF  
STATE STATUTE**

**(TITLE OF COURT AND CAUSE)**

Plaintiff complains of defendants and for FIRST CAUSE OF ACTION, alleges:

**FIRST CAUSE OF ACTION**

### I

Defendants, FIRST DOE, SECOND DOE, DOE PARTNERSHIP, and DOE CORPORATION are herein sued by fictitious names because their

true names are to plaintiff unknown, and plaintiff requests that when their true names be ascertained that this complaint may be amended by inserting such true names, and that this action proceed against defendants under their true names.

## II

Plaintiff JOHN SMITH, individually and doing business as SMITH CHICKEN FARM is a citizen of the State of California, and the defendant XYZ COMPANY is incorporated in the State of Maine and is a citizen of that State. The matter in controversy between plaintiff and defendants, exclusive of interest and costs, exceed the sum of Ten Thousand (\$10,000.00) Dollars.

## III

Plaintiff was at all times mentioned herein and now is engaged in the commercial production of select breeding chickens.

## IV

Defendant XYZ COMPANY was and still is engaged in the manufacturing, sale and distribution of "Safety Vaccine" to the public for vaccination of chickens, in order to immunize them from fowl pox.

## V

On or about the 9th day of June, 1960, plaintiff purchased from ABC Drug Store, San Francisco, California, a quantity of "Safety Vaccine" manufactured by defendant. That said vaccine was purchased by plaintiff for application to plaintiff's said chickens in order to immunize them against fowl pox.

## VI

Plaintiff relied upon defendants express warranty that said lot of "Safety Vaccine" was a safe and proper vaccine for application to plaintiff's chickens, but in fact said lot of vaccine purchased by plaintiff was unsafe, unfit and unwholesome for such purposes.

## VII

During the months of June and July, 1955, plaintiff caused 10,020 of its said breeding chickens to be vaccinated with vaccine from said lot. As a proximate result thereof said chickens were made ill resulting in the death or necessary destruction of 3,893 of said chickens and loss of powers of quality and quantity of eggs in the surviving 6,127 chickens to plaintiff's damage in the sum of One Hundred Fifty-Eight Thousand, Five Hundred Ninety-Five (\$158,595.00) Dollars.

## VIII

As a proximate result thereof plaintiff has necessarily incurred expenses for veterinarian, other specialists, laboratory expenses and expenses for its employees in the sum of \$7,000.00, has lost profits, customers, good will and reputation as a poultry dealer and has been prevented from participating in egg laying tests to his damage in the sum of Seventy-Five Thousand (\$75,000.00) Dollars.

## IX

That within a reasonable time after plaintiff so vaccinated said chickens and discovered that said vaccine was unsafe, unfit and unwholesome, plaintiff duly gave defendants notice thereof.

WHEREFORE, plaintiff prays judgment, as hereinafter set forth.

## SECOND CAUSE OF ACTION

AS AND FOR A SECOND AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

### I

Plaintiff repleads as though set forth at length each and every, all and singular, the allegations of Paragraphs I, II, III, IV, V, VII, VIII and IX of the First Cause of Action.

### II

That defendant manufactured said vaccine for ultimate distribution to the public for application to chickens by vaccination in order to immunize them against fowl pox. Defendant knew that plaintiff purchased said "Safety Vaccine" for the particular purpose of applying it to his chickens by vaccination in order to immunize them against fowl pox.

### III

Plaintiff is unskilled in the preparation of fowl pox vaccine and relied entirely on the skill and judgment of defendants when making said purchase of "Safety Vaccine." Defendants thereby impliedly warranted to plaintiff that said lot of "Safety Vaccine" was reasonably safe and wholesome and fit for the purpose of applying to plaintiff's chickens by vaccination in order to immunize them against fowl pox.

## THIRD CAUSE OF ACTION

AS AND FOR A THIRD AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

### I

Plaintiff repleads as though set forth at length each and every, all and singular, the allegations of Paragraphs I, II, III, IV, V, VII, VIII and IX of the First Cause of Action.

### II

Defendants are merchants who commonly deal in medicines and vaccines. Plaintiff made said purchase of said lot of "Safety Vaccine" by description thereof and defendants are thereby deemed to have warranted said vaccine to be of good and merchantable quality and fit, safe and wholesome and in proper condition for the ordinary purpose for which said vaccine is used.

### III

Plaintiff relied on defendants' implied warranty that said vaccine was of such merchantable quality and fit, safe and wholesome and proper for application to plaintiff's chickens, but in fact this lot of vaccine, purchased by plaintiff, was unmerchantable, unfit, unsafe, unwholesome and improper for such purpose.

## FOURTH CAUSE OF ACTION

AS AND FOR A FOURTH AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

## I

Plaintiff repleads as though set forth at length each and every, all and singular, the allegations of Paragraphs I, II, III, IV, V, VII, VIII and IX of the First Cause of Action.

## II

Defendants so negligently and carelessly manufactured, processed and packaged said lot of "Safety Vaccine" as to cause it to contain unsafe, harmful, deleterious, toxic and contaminated material thereby rendering said vaccine unsafe and dangerous in character in its application to chickens.

## FIFTH CAUSE OF ACTION

AS AND FOR THE FIFTH AND SEPARATE CAUSE OF ACTION,  
PLAINTIFF ALLEGES:

## I

Plaintiff repleads as though set forth at length each and every, all and singular, the allegations of Paragraphs I, II, III, IV, V, VII, VIII and IX of the First Cause of Action.

## II

Said lot of "Safety Vaccine" was either manufactured, prepared, compounded and packed in this State, or introduced into this State from some other State, Territory, or District of Columbia, or a foreign country by defendants. Said vaccine was sold, offered for sale and kept for sale within this State by defendants.

## III

At all times mentioned herein, and at said time as defendants manufactured, prepared, compounded, packed, sold, offered for sale, advertised or kept said vaccine for sale within the State of California, or introduced it into this State from another State, Territory or the District of Columbia, or a foreign country, said vaccine was adulterated and misbranded in violation of Section 26280 of the Health and Safety Code of the State of California, which was in full force and effect as the law of the State of California at all times mentioned herein. As a user of said vaccine in the ordinary course of business, to immunize his select breeding chickens against fowl pox, plaintiff was at all time mentioned herein, one of the persons within the class of persons for whose protection Section 26280 of the Health and Safety Code of the State of California was enacted. That Section provides as follows: "S-26280 *MANUFACTURE, etc., of adulterated or misbranded goods prohibited.* The manufacture, production, preparation, compounding, packing, selling, offering for sale, advertising or keeping for sale within the State of California, or the introduction into this State from any other State, Territory or the District of Columbia, or from any foreign country, of any drug or device which is adulterated or misbranded is prohibited."

## SIXTH CAUSE OF ACTION

AS AND FOR A SIXTH AND SEPARATE CAUSE OF ACTION,  
PLAINTIFF ALLEGES:

## I

Plaintiff repleads as though set forth at length each and every, all and singular, the allegations of Paragraphs I, II, III, IV, V, VII, VIII and IX of the First Cause of Action.



## II

Said "Safety Vaccine" is a drug, medicine, chemical and pharmaceutical preparation. It was manufactured, compounded, introduced into interstate commerce and sold by defendants for the purpose of being injected into chickens to prevent said chickens from contracting fowl pox or to reduce the likelihood of the same.

## III

The professed standard of purity, quality and strength of said "Safety Vaccine" with which plaintiff's chickens were inoculated, was that said vaccine could be injected into them without causing death, disease or injury. In manufacturing, compounding, introducing into interstate commerce and selling said vaccine, defendants did profess and represent its standard of purity, quality and strength to be as herein alleged.

## IV

In fact, said vaccine with which plaintiff's chickens were inoculated was impure, adulterated, misbranded and contained harmful substances. In violation of Sections 331, 351, and 352 of the Federal Food, Drug and Cosmetic Act, which read as follows:

"331. *Prohibited acts.* The following acts and the causing thereof are hereby prohibited: (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"351. *Adulterated drugs and devices.* A drug or device shall be deemed to be adulterated—(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; or (2) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; . . . (b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. . . . (c) If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess."

"352. *Misbranded drugs and devices.* A drug or device shall be deemed to be misbranded—

\* \* \* \*

(j) If it is dangerous to health which used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof."

## V

In manufacturing, compounding, introducing into interstate commerce, and selling said vaccine in violation of the laws of the United States, defendants were negligent and liable for injury arising from said violations.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages as alleged in the sum of \$158,595.00;
2. For costs of suit and other meet relief.

## APPENDIX B (Instructions)

### IMPLIED WARRANTIES

I instruct you that California Civil Code, Section 1735 (1) reads as follows: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer *relies* on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

### DEFINITIONS

You are instructed that an express warranty may be defined as an affirmation of fact or promise by the seller relating to the product that he sells.

An implied warranty is a warranty which the law imposes upon the manufacturer or seller, even though not expressed in words.

### FITNESS FOR THE PURPOSE

You are instructed that Section 1735 of the Civil Code of the State of California provides in part: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

### NEGLIGENCE NOT REQUIRED IN WARRANTY ACTION

You are instructed that that portion of the California Civil Code just read to you is not based upon negligence. In order to prove a cause of action for breach of warranty, it is not necessary for plaintiff to prove any negligence on the part of the defendant, or to prove that the defendant failed to exercise care in the manufacture of his product.

You are instructed that the portion of Section 1735 of the California Civil Code just read to you applies to foodstuffs, including bakery products of the kind sold by defendant ABC Company to the plaintiff, Jane Jones.

### ELEMENTS OF WARRANTY

You are instructed that the warranty of fitness for a known purpose just read to you is breached if the evidence establishes each of the following elements:

1. That the buyer, expressly or by implication, made known to the seller the particular purpose for which the goods were required.
2. That it appears that the buyer relied on the seller's skill or judgment.
3. That the product sold was not reasonably fit for such purpose.

In this case, the defendant ABC Company has admitted in its answer filed herein that it knew the purpose for which the article involved was sold. If, therefore, you find from the evidence that Jane Jones relied upon the seller's skill and judgment and suffered an injury as a proximate result of the unfitness of the product for its intended purpose, she is entitled to a verdict.

### NO PRIVITY REQUIRED

You are instructed that it is not necessary for the plaintiff to prove that the defendant ABC Company sold the article involved directly to Jane Jones. You are instructed that if you believe from the evidence that the alleged warranty of fitness just read to you was breached by defendant ABC Company, and that plaintiff Jane Jones suffered an injury as a proximate result of such breach, she is entitled to a recovery in this case.

### TRADE NAME PURCHASE DOES NOT PRECLUDE AN IMPLIED WARRANTY

In considering whether or not there was an implied warranty of fitness in this case, you shall take into consideration the fact that the product here involved was sold by its brand name of (insert name).

If the requisites of an implied warranty for a particular purpose are present—the seller's knowledge of the special purpose for which the product was to be used and the buyer's reliance upon the seller's skill and judgment—the fact that the product sold is described by its trade name does not prevent the imposition of an implied warranty of fitness.

Where a purchaser buys a product by its brand name, he may be relying upon his own judgment or the promotional efforts of the manufacturer rather than the skill and judgment of the seller. If this is so, then there is no implied warranty of fitness for the particular purpose.

Which of the foregoing possibilities applies in this case is to be determined by you from all of the evidence.

### EXPRESS WARRANTY DOES NOT NECESSARILY PRECLUDE IMPLIED WARRANTY

The warranty of (fitness) (merchantability) upon which I have heretofore instructed you is applicable in this case even if you find that a defendant made an express warranty to the plaintiff to the extent that such express warranty is not inconsistent with the implied warranty of (fitness) (merchantability). You are instructed that California Civil Code, Section 1789 (6), provides: "The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty."

### MERCHANTABILITY

I instruct you that C.C. 1735 (2) reads as follows: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

### MERCHANTABLE QUALITY—DEFINED

The term "merchantable quality" means of such quality that the product is reasonably suited for the ordinary use it was manufactured to meet. If you find from the evidence in this case that the (product) purchased by plaintiff failed to conform to the standard of being reasonably suited for the ordinary use it was manufactured to meet, then such (product) was not of merchantable quality.

### MERCHANTABLE QUALITY

In determining whether the (product) here involved complied with the implied warranty of merchantability, you may take into consideration the following definition:

By "merchantable quality" is meant a product that is reasonably suited for the ordinary use and purposes of products of the general type described by the terms of the sale and which are capable of passing in the market under the name or description under which they are sold.

### UNUSABLE FOR PURPOSE

If the (product) involved in this case was unusable for the purpose for which it was intended, then and in that event you are instructed that under the law it was not of merchantable quality, and defendant breached the implied warranty of merchantability upon which I have heretofore instructed you.

### DESCRIPTIVE NAMES

Descriptive names used in the (advertisements describing an article) (label on said article) constitute a warranty as to the general characteristic of the article. No warranty as to the degree of excellence is thereby made.

### DISCLAIMER

Defendant has set up in defense to his action that "there exists no warranty of (fitness) (merchantability) (other) by reason of the words contained in the (contract between the parties) (label) (other) . . ."

Whether or not this language amounts to a disclaimer of said warranty amounts to a question of fact to be determined by you. The language used is to be construed strictly against defendant and in favor of plaintiff in the event that there is any uncertainty as to the precise meaning of the language used.

### PROXIMATE CAUSE—FOOD & DRUGS

In order for plaintiff to recover damages from defendant for breach of warranty, it is necessary that you find from a preponderance of evidence that there was a breach of warranty and that such breach, if any, was the proximate cause of the injury to plaintiff.

This instruction relates only to the necessity of the element of proximate cause, and it is to be considered by you only in its relation to all the other instructions given you on breach of warranty.

Neither intent nor motive nor wilfulness are essential elements for a cause of action for breach of warranty. A cause of action for breach of implied warranty arises under the laws of this state by operation of law, irrespective of any intention of the seller or manufacturer to create it. It is a conclusion or inference of law, and, unless specifically negated or waived, becomes a part of the contract of sale by virtue of the applicable statutory provisions. It is sufficient, to establish breach of warranty, if you find that the (product) (manufactured) (sold) by defendants did not comply with the warranty of (fitness) (merchantability) (express warranty set forth) as heretofore defined and that as a consequence of the use of such (product) by plaintiff, he suffered injury or damage.

### WHETHER REASONABLY FIT

Whether or not a product is reasonably fit for the purpose for which it was intended is a question of fact. If you find that the (product) here involved was properly used and maintained and that it failed in normal use following its purpose, that is some evidence that it was not fit for the purpose for which it was intended.

### WARRANTY—BY IMPLICATION OF LAW

Although the contract between plaintiff and defendant here states that it includes the entire agreement, still, any warranty of fitness or merchantability which the law might imply to the sale of a product is a part of the contract.

### DAMAGES—BREACH OF WARRANTY

If, in accordance with the Court's instructions, you find that there was a breach of warranty, (implied warranty that the [product] should be reasonably fit) (implied warranty that the [product] should be merchantable) (express warranty heretofore mentioned), then you are instructed that Section 1789 (6) of the Civil Code of the State of California is applicable. That section provides: "The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty."

### EXPRESS WARRANTY WITHOUT PRIVITY

Even though there was no contract between plaintiff here and the defendant, an express warranty may arise by reason of advertisement. Any representation as to a special quality of the product made by the manufacturer to induce sale upon which the buyer relies constitutes a warranty.

### NOTICE OF BREACH

Before a seller may become liable for breach of warranty, it is required of the buyer that he shall have given notice of the breach within a reasonable time after he knew, or as a reasonable person ought to have known, of the claimed defect or failure in the goods.

Whether such required notice was given within a reasonable time is for you, the jury, to determine under all the circumstances of the case, having in mind the product in question.

A notice is sufficient, if it advises the seller that the buyer intends to look to him for damages resulting from an alleged breach of warranty.

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### *In a Drug Case*

Inviting attention to the specific instructions of a drug (vaccine) case, we include a selected few from the entire charge for counsels' consideration. Appraising these instructions, it will be remembered that the minor plaintiffs involved were not the purchasers, but the ultimate users of the product.

### WARRANTY—EDUCATIONAL

Plaintiffs in this case have sued both on the basis of negligence and warranty. In considering the causes of action based upon warranty it is not

necessary for you to consider whether or not defendants were negligent. Liability for breach of warranty arises independent of negligence.

The liability, if any, for breach of warranty on the part of defendants is created by certain sections of the Civil Code of the State of California. In these sections of the Code which will be read to you reference is made to a "buyer." For the purpose of the cases before you, the persons to whom poliomyelitis vaccine was administered stand in the same relationship and have the same rights as if they had themselves purchased the vaccine from defendants.

### **BREACH OF IMPLIED WARRANTY OF FITNESS**

I instruct you that Subsection 1 of Section 1735, California Civil Code, which was just read to you has to do with what in law is termed "*implied warranty*." Implied warranty is not based upon negligence and in order to prove a cause of action under this section, it is not necessary that any of the plaintiffs should have proved any negligence on the part of the defendant, ABC Laboratories. In order for Section 1735, Subsection 1, to apply in this case, that is in order for an implied warranty of fitness for a known purpose to be breached, it is sufficient if the evidence establishes each of the following elements:

1. That the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required;
2. That it appears that the buyer relies on the seller's skill or judgment (whether the seller be a grocer, manufacturer or not); and
3. That the products sold were not reasonably fit for the purpose for which such goods were required.

### **MERCHANTABLE QUALITY**

If the vaccine involved in this case was unusable for the purpose for which it was intended then and in that event I instruct you that under the law it was not of merchantable quality and defendant breached the implied warranty of merchantability on which I have heretofore instructed you.

### **MERCHANTABLE QUALITY DEFINED**

Merchantable quality means of such quality that the product is reasonably suitable for the ordinary use it was manufactured to meet. If you find from the evidence in this case that the vaccine administered to plaintiffs contained live virus and that the live virus was the proximate cause of plaintiffs' poliomyelitis, then said vaccine was not of merchantable quality.

### **PRODUCT FOR HUMAN CONSUMPTION**

If a product is sold for human consumption or for use in human beings and if it contains harmful or deleterious ingredients and if it is used in the manner expected and intended, then you are instructed that that product is not of merchantable or fit quality.

### **PROOF OF NEGLIGENCE NOT REQUIRED**

You are instructed that the portions of Section 1735 of the California Civil Code just read to you are not based upon negligence. In order to prove a cause of action under said section, it is not necessary for the plaintiffs to prove any negligence on the part of the defendants.

### APPLICATION OF IMPLIED WARRANTY

I instruct you that if, upon all the evidence in this case and upon all the instructions of this Court you find that defendant ABC Laboratories manufactured and sold a product upon the open market which it knew was intended solely for injection into human beings and that the sole purpose of said product was to immunize human beings against a disease known as poliomyelitis and if you further find that the plaintiffs herein did actually or by implication make known to defendant the purpose for which said product was being purchased and directly or impliedly relied upon the skill or judgment of defendant in relation thereto, and if you further find that said vaccine of defendant ABC Laboratories did in fact contain infectious amounts of live virus of poliomyelitis and that the injection of said vaccine into the minor plaintiffs, Jane Doe and Richard Roe, was in fact a proximate cause of said minor plaintiffs becoming diseased and infected with poliomyelitis, then I instruct you as follows:

1. That there was an implied warranty applicable in this case, that is a warranty imposed by law upon the defendant, ABC Laboratories, that the aforesaid product would be reasonably fit for the purpose for which it was sold, to wit, for human consumption.

2. That the defendant ABC Laboratories breached said implied warranty

### MEASURE OF DAMAGES FOR BREACH OF WARRANTY

If, in accordance with the Court's instructions, you find that there was a breach of an implied warranty that the poliomyelitis vaccine would be reasonably fit for the purpose for which it was sold and marketed, then you are instructed that Civil Code, Section 1789(6) of the State of California, provides as follows: "The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty."